

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 ANTHONY CULPEPPER,

Claimant,

vs.

CNH INDUSTRIAL AMERICA, LLC,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 22001932.01

ARBITRATION DECISION

Head Note Nos: 1100, 2400, 2401,
2402, 2500, 2501, 2502, 2700

STATEMENT OF THE CASE

Claimant Anthony Culpepper has filed a petition for workers' compensation benefits against CNH Industrial America, LLC, employer, and Ace American Ins. Co., insurance carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner, the hearing was held on March 6, 2023, via Zoom. The case was considered fully submitted on the same date with the parties declining the opportunity for briefing.

The record consists of Joint Exhibits 1-9, Claimant's Exhibits 1-10, Defendants' Exhibits A-C, and the testimony of the claimant.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of employment;
2. If so, whether claimant's claim is barred for lack of timely noticed under Iowa Code section 85.23 or as an untimely claim under Iowa Code Section 85.26;
3. Whether claimant is entitled to reimbursement for medical expenses;
4. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;

5. Whether claimant is entitled to further treatment, and/or
6. Whether claimant is entitled to alternate care;
7. Costs.

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 that at the time of the alleged injury, there was an employer-employee relationship. They further agree that the claimant's gross earnings were \$984.68 per week, at all relevant times herein he was married and entitled to three exemptions. The parties believe the weekly benefit rate is \$655.07 based on the foregoing numbers.

As it relates to the medical expenses, the parties agreed that the fees and prices charged by the providers are fair and reasonable, that the treatment was reasonable and necessary, and that the listed expenses in exhibit 10 are causally connected to the medical condition upon which the claim of injury is based.

FINDINGS OF FACT

At the time of the hearing, claimant was a 49-year-old person. He was married and had one dependent. Per the stipulations, he is considered to have three exemptions.

His past educational background included high school graduation in 1991 and a couple semesters at a community college studying computer-aided drafting.

His past medical history includes chronic asthma and, more recently, high blood pressure and diabetes. For traumatic injuries, he sustained a disc herniation in 2007 while working. He was released to return to work with some restrictions, such as limiting his twisting and bending from the ground to knee. In his answers to interrogatories, he also identified a low back injury and lower extremity injuries sustained in October 2009, and a low back, hips and neck injury on January 25, 2010. (Defendants' Exhibit B:5)

On April 18, 2008, claimant was seen by Rick Garrels, M.D., for a follow-up of previously reported back pain. (Joint Exhibit 1:1) Claimant exhibited full lumbar flexion. Id. Extension was mildly limited by stiffness, and he favored the right leg while walking. Id. He had returned to work with no restrictions. (JE 1:2) Dr. Garrels placed claimant at MMI and assigned an 8 percent whole person impairment. (JE 1:1)

A November 9, 2009 radiology report showed a normal thoracic spine. (JE 7:57) An MRI of the same date showed minimal annular bulging at T6–T7 without evidence of frank disc herniation. (JE 7:58) No evidence of neural foraminal stenosis or other acute osseous/disc type pathology. Id. An MRI of the lumbar spine showed multilevel degenerative changes and right lateral disc herniation with severe right-sided neural foraminal stenosis at L4-L5. (JE 7:59)

On December 2, 2009, claimant was seen by James W. Milani, D.O., for a follow up of upper to low back pain and right elbow pain. (JE 1:3) Claimant described the pain as deep, dull, aching, throbbing with stiffness. Id. The pain was increased by walking but made better with the ESI previously administered. Id. The onset of pain was noted to be October 12, 2007, and claimant maintained that he had constant pain “since the onset.” Id. He had pain in the thoracic and lumbar spine as well as in the right elbow. Id. He was given work restrictions of no lifting, pushing, or pulling more than 10 pounds and limited grasping on the right. (JE 1:4)

At the December 24, 2009, follow-up appointment claimant reported the primary pain was in the left shoulder blade with the secondary pain in the low back. (JE 1:5) There was no radiation or numbness. Id. His cervical spine was pain free and normal, but he had pain in the left scapula, tenderness in the left rhomboid area, positive straight leg raise test on the right, tenderness to palpation over both paraspinal muscles and tenderness to palpation over the lateral epicondyle on the right. Id. His work restrictions were no pulling, pushing, lifting more than 10 pounds, rare bending and stooping and alternate sitting, standing and walking. (JE 1:7)

On January 14, 2010, claimant had new restrictions imposed. These restrictions included no lifting, pushing, or pulling more than 15 pounds, occasional bending and stooping, alternating between sitting, standing, and walking, and no walking more than 50 yards at a time. (JE 1:8)

On January 25, 2010, claimant was seen by Dr. Milani for an injury to his back after falling on ice which occurred on the same date. (JE 1:9) The pain was sharp and shooting with pain radiating down the back of the legs into the toes. Id. Movement in the scapula caused pain, range of motion was limited, tenderness was present in both paraspinous areas, greater on the left than the right. Id. In the lumbar spine, there was pain in all directions, range of movement was limited by pain, and claimant had a positive straight leg raise test on the right. Id. Claimant had spasming in the paraspinous muscles and mild weakness in the right foot dorsiflexion against resistance compared to the left. Id.

On September 9, 2010, claimant’s work restrictions included limited blending, stooping and twisting to occasional, max lift from knee to waist at 50 pounds, and max lift from waist to shoulder at 40 pounds. (JE 1:12)

On November 3, 2010, claimant's work restrictions were limited bending, stooping, twisting to 5.33 times per hour with light weight, maximum 50 pound lift, and no floor to waist lifting. (JE 1:13)

Claimant testified at hearing that previous medical conditions have not impacted claimant's abilities to perform the essential functions of his employment, however he moved to a different position within the company due to the work restrictions imposed as a result of the 2007 disc herniation.

Claimant has not worked for any other employer since June 28, 2004. Defendant employer builds heavy machinery such as tractors, loader buckets, backhoes, bulldozers, and headers. Claimant began in production where he installed motor valves. He then moved to a material specialist position as a picker. His job was to go down between rows of supplies and pick out all the materials that were needed to build a tractor and put them in a basket. Seventy-five percent of his job was using a forklift. This position was assigned due to his restrictions regarding bending and twisting. (Transcript, pages 44-45)

Around 2017-2018, claimant moved into the quality specialist job. As a quality specialist, he inspects hoses and fittings to make sure they are tight and that there are no leaks. Physically, he is required to climb on top of, inside and underneath heavy machinery. To perform his tasks, he moves his head from side to side, climbs on top of things, crouches, crawls, and manipulates things with his hands and fingers.

The official job description requires a quality specialist to lift 35 pounds occasionally; be able to frequently bend/stoop, squat, kneel, and climb; be able to reach continuously, and occasionally reach above the shoulders; be able to move the head and neck with occasional rotation, extension, and frequent flexion. (Claimant's Exhibit 4:16)

His shift is 5:30 to 3:30. On the weekends, claimant does extra work as a repair person who works on parts that are in need of repair.

On August 12, 2019, claimant was seen by Shailesh Desai, M.D., for shoulder pain, ongoing for a couple of years with no inciting traumatic event. (JE 2:14) Claimant was diagnosed with possible tendinitis of the left rotator cuff and ordered to use ice or heat as appropriate as well as home exercises. (JE 2:18) He was also given a two-week prescription for meloxicam. (JE 2:18). He returned to Dr. Desai's office on October 14, 2019, for a different medical condition, and in the process of relating his subjective history, he shared that the meloxicam provided some relief. (JE 2:19) In the examination section, it was noted that claimant's left shoulder was somewhat improved with a satisfactory range of motion and minimal rotator cuff impingement. (JE 2:22)

A week later on October 22, 2019 claimant presented with left shoulder pain and the inability to abduct his left arm. (JE 2:24) On examination, he exhibited tenderness on the left anterior shoulder and rotator cuff impingement on abduction and internal rotation. (JE 2:27). The plan was to follow him for 2 to 3 weeks, and if there was no

improvement, he would undergo a cortisone shot or an MRI. (JE 2:28) He mentioned that he sustained a left shoulder injury at work. Id.

Claimant currently works as a quality specialist. This is the job that he was performing when he was allegedly injured in 2021 and it was the job he returned to since that time.

Claimant testified that prior to 2021 he had not had any specific treatment to his neck, nor has he had any neck pain that he felt was a serious problem. Any neck pain that he had prior to 2021 was such that he was able to work through it. He did have some neck pain in 2017 and 2018, but it was nothing he could not tolerate. After he transitioned to the quality specialist position, the pain began to worsen including radiation symptoms such as tingling down the arm. For his current symptomatology, claimant maintains that he has pain from his shoulder down the left arm into his fingertips.

He testified that it was in the beginning of 2021 when his condition worsened and then around May or June, it progressed to the extent that he sought out medical care. Claimant could not pinpoint an exact date or time period during which he reported this condition to the employer. Claimant testified that sometime in 2021 he reported problems with numbness and tingling in the arm to health services at his employer. They would provide palliative care such as heat or ice and then claimant would return to work. He testified that he told his employer that the numbness and tingling was related to work activities. Ultimately, claimant was sent to James Milani, D.O., by defendants, but that referral did not materialize until September 2021.

June 8, 2021, was the first time he visited a doctor related to the neck pain and arm tingling. He testified that he knew that the pain was a "little intolerable" before June 8, 2021, but that it was the first time he was able to get in to see the doctor. He pinpointed that it was "earlier that year, that's what it started to give me a lot of problems." (Tr., p. 27) He also stated that the pain had been steady for one to two years. (Tr., p. 26) On June 8, 2021, claimant presented to Dr. Desai for numbness and tingling in the upper left extremity, radiating into the left wrist. (JE 2:29) The symptoms had been going on for about 1 to 2 years, but there was no inciting traumatic injury. Id. An EMG was ordered. (JE 2:35) The EMG was conducted on July 13, 2021, and the results were normal. (JE 8:64)

On September 3, 2021 claimant underwent a cervical epidural steroid injection for his cervical and left arm radicular pain by Timothy Miller, M.D. (JE 6:56)

On September 21, 2021, claimant was seen by Dr. Milani for low back pain and left upper extremity radicular symptoms. (JE 4:46) The medical note discussed that the pain extended back 14 years due to building tractors on the line for defendant. Id. It was noted that an ESI relieved claimant's symptoms by approximately 40 percent. Id. The gabapentin was not helping. Id. Physical therapy did provide some relief. Id. Claimant was still performing his regular job duties. Id. Dr. Milani referred claimant to Dr. Abernathey as a possible surgical candidate. Id.

Claimant testified that Dr. Milani spoke more with the caseworker that accompanied him than with claimant. (Tr., p. 33)

Claimant began seeing Chad Abernathy, M.D., on October 29, 2021 for chronic neck and left arm pain and paresthesia associated with mid to low back pain. (JE 3:44) In the history section, Dr. Abernathy documented that the claimant reported pain in the cervical, thoracic and lumbar region dating back to 2007. Id. He underwent an evaluation in 2009 for the symptoms and was treated with conservative management. Id. Over time his pain became more prominent, and he attributed symptoms to his work activity. Id. He developed more prominent left upper extremity pain, paresthesia with weakness on extension of the arm, wrist and fingers. Id. Claimant underwent conservative management under the care of several physicians, including Terry O'Neal-Cox, M.D., James Milani, M.D., and others. Id. To date, medical management, including physical therapy and epidural steroid injections, did not relieve his symptomatology. Id. Claimant was referred to Dr. Abernathy for a neurosurgical opinion. Id.

Dr. Abernathy's read of the MRI was that claimant had modest degenerative changes at multiple levels, except for a left C6-C7 prominent lateral disc extrusion/osteophyte complex with neural foraminal stenosis. (JE 3:44) This left-sided disc degeneration was consistent with persistent left upper extremity pain, paresthesia, and weakness. Id. Claimant also demonstrated evidence of sensorimotor deficit in the C7 distribution. Id. Dr. Abernathy recommended an anterior cervical discectomy and fusion with an instrumented allograft at C6-7 to which claimant agreed. (JE 3:45)

On November 16, 2021, Dr. Abernathy penned a letter in response to an inquiry from the defendants. (JE 5:52) In the letter, he stated that he had not been provided any information or history regarding any new work injury after October 12, 2007, as it related to claimant. Id. He affirmed that it was his opinion claimant would benefit from a fusion operation at C6-C7 related to his long-standing degenerative changes. Id.

On March 22, 2022, Dr. Abernathy signed off on a letter authored by defendants in which he affirmed that at no time did the claimant provide Dr. Abernathy with any history of any work-related injury that occurred to claimant's cervical spine in 2021. (JE 5:53) He further opined that it was more likely than not that the need for cervical fusion surgery being proposed would have been related to claimant's long-standing degenerative condition rather than any work injury. Id. Dr. Abernathy agreed that there was no new work injury from 2021 that caused the need for the surgery.

Claimant's request for authorization of his surgery was denied by defendants as was care recommended by other doctors such as Dr. Miller. Claimant testified that he received multiple calls from Dr. Miller's office, wondering why he wouldn't come in to get a repeat injection. (Tr., p. 35)

Claimant returned to Dr. Abernathy on May 18, 2022, to discuss the surgery once again with the costs to be covered by his private insurance. (JE 3:5) Dr. Abernathy agreed, but recommended another MRI as the previous one was dated August 2021. Id.

An MRI of the cervical spine was conducted on September 15, 2022, which showed multilevel degenerative disc disease with a large central/left paracentral, and foraminal disc osteophyte complex resulting in moderate spinal stenosis. (JE 7:62-63) There was a mass effect and effacement of the left ventral aspect of the thecal sac/spinal cord. Id. There was also bilateral uncovertebral joint hypertrophy and facet arthrosis resulting in severe left and moderate to severe right neural foraminal narrowing. (JE 7:63) Overall, this appeared similar to mildly progressed since the August 2021 exam. Id. Additional findings included changes at C5/C6 with a central/left paracentral protrusion/disc osteophyte complex. Id.

Unfortunately, due to a strike, claimant's personal health insurance was no longer available, and he was not able to go through with the surgery.

On September 6, 2022, Peter Matos, D.O., MPH, conducted an independent medical examination of claimant at the request of defendants. (DE A:3) Claimant reported that his neck pain was 6 to 7 on a 10 scale at its worst and 5 on a 10 scale at its best. (DE A:4) The neck pain radiated into the left shoulder blade and shoulder. Id. A brace and medications helped reduce the pain to five on a 10 scale. Id. Claimant had not been working since May 2022 when the union went on strike, and he had no physical therapy since January 2022. Id.

On examination, the right and left wrist revealed no swelling or signs of tenosynovitis. Id. Flexion and extension were within normal limits. Id. Grip strength was 4/5 on the left versus 5/5 on the right. Id. All special tests of the wrist were negative except for cubital tunnel positive on the right. Id.

For the left and right elbow, only tenderness at the right medial epicondyle was noted. Id. The cervical spine was normal with no tenderness to palpation, except for a positive Spurling's on the left. Id. His right shoulder examination was negative, except for tenderness at the clavicle and AC joint. Id.

For his left shoulder, range of motion was normal, shoulder flexion was 180 degrees, shoulder extension was 55 degrees, shoulder abduction was 180 degrees and shoulder rotation was 90 degrees. These measurements were the same on the right as well. Strength was within normal limits. There were no positive special tests, but he was tender at the clavicle and AC joint. Id.

Dr. Matos concluded that claimant did not sustain any injury to his left upper extremity, and/or cervical spine, which was causally connected to work activities performed for the defendant. (DE A: 5) Dr. Matos mentioned Dr. Abernathey's findings as support for this opinion. Id.

On December 16, 2022, Sunil Bansal, M.D. performed an independent medical examination at the request of the claimant. (CE 1:1) In the subjective portion, Dr. Bansal documented complaints of continual neck pain and left arm weakness. (CE 1:6) Claimant was not using the left arm to lift overhead, but rather used his right hand and arm for all lifting with his left hand as a helper or guide. Claimant reported numbness in his left fingers and burning pain between the shoulder blades. Id. He dropped objects from his left hand, and it was painful to look down or up for long periods of time. Id.

During the physical examination, claimant exhibited tenderness to palpation over the cervical paraspinal musculature, greater on the left. (CE 1:6) Guarding was noted over the left cervical paraspinals. Id. Multiple trigger points were palpated. Id. He had a loss of sensory discrimination over the ring and small fingers and reduced upper extremity strength on the left triceps compared to the right. Id.

Dr. Bansal concluded that claimant sustained a C6 to C7 disc extrusion as a result of the cumulative effects of work activities up through October 2021. (CE 1:7) He recommended Mr. Culpepper undergo surgical arthrodesis for the cervical spine disc extrusion. Id. For impairment¹, he assigned 15 percent whole person impairment.

To elaborate on his opinion, Dr. Bansal wrote:

It is my medical opinion that the job duties Mr. Culpepper performed on a cumulative basis for Case-New Holland for 18 years were a significant contributory factor for his C6–C7 disc extrusion, as well as the aggravation of a cervical spondylosis and facet arthropathy coming forward to October 2021. His job required him to lift panels weighing 70 to 80 pounds, as well as repetitive flexion, extension and significant rotation of his neck while driving the forklift. Cumulatively, this would greatly stress the cervical spine, likely leading to some level of disc bulging.

Anatomically, the neck supports the head. With constant repetitive flexion, the muscles of the neck, shoulders, and upper limbs can become overworked and injured. Typically an adult head weighs around 12 pounds. This is comparable to the weight of a bowling ball. If you hold that bowling ball with your arms outstretched in front of you, they will fatigue quickly. If it is held close to your body, you can support it much more easily. The same applies to your head. As you are repetitively flexing it, the muscles and joints in your neck, desperately hang on as they support the weight of your head. As your head pulls down and forward, your neck gets overloaded, causing strain to those muscles and joints.

(CE 1:8)

According to claimant's exhibit 10, he has incurred \$511.00 in medical charges from SEIMRC and \$687.16 in medical charges from Davis Radiology for a total of \$1,198.16. (CE 10:59)

Dr. Bansal charged \$578.00 for the independent medical evaluation and \$2,893.00 for the report. (CE 6:53). The total cost of the Bansal IME was \$3,471.00. Id.

Claimant has incurred costs of \$100.30 for the filing fee (CE 7:54)

CONCLUSIONS OF LAW

Claimant alleges he has sustained a cumulative injury to his neck, shoulder, and left upper extremity as a result of the cumulative work he performed for defendant

¹ Impairment is not an issue in this hearing.

employer, manifesting in 2021. Defendants argue that claimant's current symptomatology stems from underlying degenerative disease, and that even if the symptoms are work related, claimant is time barred from recovering any benefits.

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" refer 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.

There is no dispute that claimant is in need of surgery at his C6–7 level due to disc extrusion.

The starting point for this case is to determine whether claimant's current symptomatology including fusion at the C6-C7 levels is the result of claimant's underlying degenerative condition or caused by cumulative trauma from his work duties.

Claimant has had a history of back pain. It began in 2007 with a work injury to his lumbar and thoracic region. In 2009, he sought treatment for right elbow pain. In December 2009, claimant reported left shoulder blade pain but no pain in the cervical spine. Ultimately, he was given work restrictions regarding bending and stooping, and as a result moved into a position where he used a forklift for 75 percent of his workday.

In late 2019, claimant sought treatment for left shoulder pain. He mentioned having a left shoulder injury at work. Claimant's treatment was brief and there were no further medical records pertaining to his back, neck or shoulder until June 8, 2021, when he was able to see Dr. Desai. At the June 8, 2021, visit, he reported that the pain in his neck and arm had been ongoing for one to two years. He testified that he was having pain in his neck with radiation into the arm for some time in 2021 but that, at first, he thought he could work through it. When the pain became intolerable, he sought treatment.

Dr. Abernathey opined that claimant's need for surgery was due to claimant's longstanding degenerative changes. Dr. Abernathey is a surgeon, and in fact, the surgeon claimant selected to perform the cervical fusion. Dr. Abernathey cited the lack of any traumatic work injury as part of the basis for his opinion.

On the other hand, Dr. Bansal, an occupational health specialist, opined that claimant's disc extrusion was the result of cumulative effects of claimant's work. He wrote in his opinion that claimant's job required him to lift panels weighing 70 to 80 pounds and there were job duties that required repetitive flexion, extension and rotation of his neck. The official job description required claimant to lift 35 pounds occasionally. He did not testify that he lifted heavy weights either. His primary task is to climb in, around, and under the heavy equipment to ensure that all connections are tight with no leaks.

Dr. Bansal's assumptions underlying his opinion do not match the claimant's testimony nor the official job description. The medical records support a long-standing issue. In the September 21, 2021, medical record it was noted that claimant's pain went back 14 years due to building tractors on the line for the defendant. In his initial meeting with Dr. Abernathy, claimant's condition was marked as "chronic" and that the claimant reported pain in all regions of his back dating back to 2007. The claimant's current condition is the result of deterioration since 2007 but, as Dr. Abernathy opined, it was not the result of claimant's work, but rather a progression and end result that would have happened regardless of claimant's work. In order for a cumulative injury to be compensable there must be substantial evidence that a trauma occurred rather than the injury being the result of natural processes of nature. Further, increased disability from a prior injury, even if brought about by further work, is not a new injury. Claimant argues that each day of work or the cumulative work experience was the new trauma; however, the evidence is more indicative of a chronic, long-standing condition that manifested itself in various aches and pains over the years. It is found that the claimant's current condition is not related to cumulative injury, but rather the natural breakdown of claimant's cervical spine.

Even if the evidence supported a finding that the C6-C7 disc extrusion was the result of claimant's work, the issue regarding notice would bar claimant's recovery.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Problematically, claimant did not provide a date upon which he reported his injury to his employer. On June 8, 2021, claimant sought treatment for neck pain but he related that the pain had been ongoing one or two years. He testified that he reported this pain previous to June 8, 2021, but no action was taken. However, he also testified that his reports of pain to the health staff with defendant employer led him to an appointment with Dr. Milani that took place in September. There is no explanation in the record as to why the medical staff acted differently to the pre-June 8, 2021, pain complaints. There is no evidence of actual notice nor imputed notice. The lack of notice would prevent recovery in this case even if liability was established.

The issues regarding medical bills and future medical care are moot.

The final issue is whether claimant is entitled to the reimbursement of Dr. Bansal's IME. Defendants argue that they are not responsible because they are not liable for any current symptoms. Iowa Code section 85.39 does require compensability to be established before claimant is entitled to reimbursement for an IME. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980) (noting that reimbursement for medical examinations presupposes a right to compensation has been established). Compensability has not been established and therefore claimant is not entitled to an 85.39 examination.

ORDER

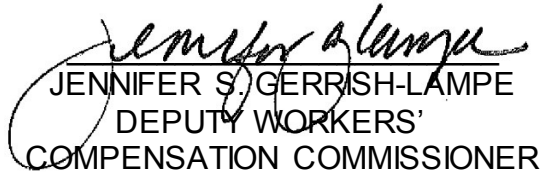
THEREFORE IT IS ORDERED:

Claimant is not entitled to reimbursement of any medical bills.

Claimant is not entitled to the reimbursement of Dr. Bansal's fee.

The costs shall be borne equally between the parties including the cost of the hearing transcript.

Signed and filed this 17th day of August, 2023.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Pothitakis (via WCES)

Timothy Wegman (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.