BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE TRIPLETT,

Claimant,

vs.

OMG D/B/A HALLETT MATERIALS,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5056594

ARBITRATION

DECISION

Head Notes: 1704, 1802, 1803, 2800

STATEMENT OF THE CASE

Mike Triplett, claimant, filed a petition in arbitration seeking workers' compensation benefits from OMG d/b/a Hallett Materials (Hallett) and its insurer, Liberty Mutual Insurance Company, as a result of an injury he allegedly sustained on April 25, 2016 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on February 1, 2019. The evidence in this case consists of the testimony of claimant, Scott Bohm, Joint Exhibits 1 – 6, Claimant's Exhibits 1 – 6 and Defendants' Exhibits A – H. Both parties submitted briefs.

ISSUES

1. Whether claimant sustained an injury on April 25, 2016 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's disability.

5. The commencement date for permanent benefits.

6. Whether claimant provided timely notice of this claim to the defendants.

7. Whether claimant's claim is barred by the statute of limitations.

8. Whether claimant is entitled to payment of an independent medical examination.

9. Assessment of 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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Mike Triplett, claimant, was 64 years old at the time of the hearing. At the time of the hearing claimant was receiving Social Security Retirement benefits. Claimant obtained the Social Security benefit after his unemployment benefits ran out. (Transcript page 15) Claimant resides in Spokane, Washington with his wife, his son and daughter-in-law. Claimant graduated from high school. Claimant served in the U.S. Navy for three years and was honorably discharged from the Navy. Claimant completed a one-year program at a community college after he left the Navy. (Tr. p. 17) Claimant received an applied science degree in industrial electricity. (Exhibit 6, p. 50)

Claimant worked for Westinghouse on electrical motors for about eleven years. Claimant said the work was heavy. For the last three years at Westinghouse he operated a 20-pound grinder up to 12 hours a day as well as sandblasting with steel shot the inside of tanks. (Tr. p. 22)

Claimant next worked for Cunningham Sand and Gravel. Claimant did electrical work on various plants, shops and equipment. (Tr. p. 26) Claimant continued to work at Cunningham when it became part of Acme Materials. Acme later became part of Hallett. (Tr. pp. 27, 29) Claimant testified he generally agreed with the job description in Exhibit 4, pages 35 through 37, but said that on some occasions he would lift more than 100 pounds. (Tr. p. 38)

Claimant testified about a number of work injuries he has had over the years while working for Hallett. Claimant had one incident when he was in a trench and popped his knee and informed his supervisor. Claimant's knee returned to normal and no claim was filed. (Tr. p. 42) Claimant injured his back in 1997 while driving a skid loader. He had back fusion surgery due to this injury. (Tr. p. 42) Claimant testified that he had been told by his doctor that in ten to fifteen years he would need additional

surgery. (Ex. F, p. 27) Claimant was off work for about six months and received indemnity payments. (Tr. p. 43) Claimant had a right shoulder rotator cuff tear which required surgical repair. (Tr. p. 44) Claimant had a hernia at work that required medical treatment. (Tr. pp. 44, 45) Claimant also had bilateral carpal tunnel syndrome. Claimant said it had been going on for six to nine months and then he saw a doctor who told him it was a work-related injury. (Tr. p. 114)

Claimant has received treatment for most of these injuries and has from time to time received chiropractic care for his back. (See Generally Joint Exhibit 1; Ex. F, p. 28) Claimant testified that he would receive chiropractic adjustments and then go for long periods without the need for this treatment.

Claimant worked for Hallett in the Spokane, Washington area. In October 2013, claimant moved to Iowa to perform work for Hallett. (Tr. pp. 46, 54) Claimant would work at sand, crush and wash plants doing electrical work. (Tr. p. 56) Claimant generally would work 50 to 60 hours a week in Iowa. (Tr. p. 58)

Claimant's primary care physician in Iowa was James McQueen, D.O. (Tr. p. 60) On December 17, 2015 claimant spoke to Dr. McQueen about his back. (Tr. p. 62) Dr. McQueen noted claimant worked with heavy construction equipment and developed recurrent back pain. (Tr. p. 61) Claimant said that Dr. McQueen wanted to have an MRI performed, but claimant had a trip planned out of state and the MRI was scheduled for January 2016. (Tr. p. 63) Claimant testified that he met with Dr. McQueen on January 19, 2016 and Dr. McQueen did not like the look of the MRI and suggested claimant should see a specialist. (Tr. p. 64) Claimant saw Eric Phillips, M.D. on January 27, 2016 for his back. Claimant testified:

> A. No, it is Phillips, yes, Dr. Phillips, yes. He's the one that wanted to do a complete steel bars and metal, all kinds of stuff, I believe, if that's the one. It was either that, or that Coflex.
>
> Q. Well, he wanted to do a surgery, obviously?
>
> A. Yes, he did want to do a surgery. He felt that it was a necessity because of the damage done to the disks in my low back.
>
> Q. So you have this news that he wants to do what sounds like a pretty significant surgery?
>
> A. Yes, sir.

(Tr. pp. 64, 65) Claimant testified that the surgery Dr. Phillips was recommending was sent to his regular health insurance for approval for payment. Claimant testified that no one told him his back condition was a work injury. (Tr. p. 66) Claimant was informed by Dr. Phillips' office that the insurance company would not approve the surgery. Claimant testified that he contacted the HR department at Hallett and spoke to Britney (no last name given) in the end of March 2016 or first of April to ask how he could appeal the

decision of the insurance company. (Tr. pp. 68, 69) Claimant did not mention to Britney that his back condition might be work related, as then he testified that he had "no clue" that the injury could be work related. (Tr. p. 108) Claimant testified that it was at that time he first started to think his back condition might be related to his work at Hallett. (Tr. p. 70) Claimant said he spoke to Kyle Timmer, a regional manager shortly after he spoke to Britney.

Claimant testified that Mr. Timmer asked him about his condition, as claimant had talked to Britney about the insurance denial and Mr. Timmer wanted to talk to claimant about the denial. Claimant testified that he told Mr. Timmer he thought his back might be work-related in early April 2016. (Tr. pp. 71,118) Mr. Timmer did not testify.

Claimant testified that on April 25, 2016 he was asked to come into the office and was told he was terminated, as Hallett was not going to have their own electrician. Claimant said the termination was abrupt and he had no prior warning. (Tr. pp. 74, 75) Claimant testified that a couple of days after his termination he sought legal advice as to whether he might have a work injury and authorized his attorney to file a claim for workers' compensation. (Tr. p. 77)

Claimant testified that he saw John Gachiani, M.D. of Mercy Brain and Spine in April 2017 and was told by Dr. Gachiani that, "...[T]here was no reason to think that it wasn't other than a workers' compensation." (Tr. p. 80) Dr. Gachiani performed surgery on March 23, 2018. (Tr. p. 85) Claimant agreed that Dr. Gachiani has not provided him any permanent restrictions. (Tr. p. 126)

After claimant's termination from Hallett he collected unemployment. Claimant was able to find a job driving a school bus for one and one-half school years. (Tr. p. 83) Claimant started driving in October 2016 for the school district. (Ex. F, p. 21) Claimant testified that by December 2017 he could no longer tolerate driving a school bus. (Tr. p. 85) Claimant worked for about two weeks driving a dump truck. Claimant was not able to tolerate the bouncing and could not continue driving. (Tr. p. 84) Claimant has not looked for work since he moved back to Spokane, Washington in September 2018. (Tr. p. 102) Claimant testified that sitting longer than an hour caused him discomfort. Claimant uses a TENS unit for pain. Claimant has difficulty sleeping due to pain. Claimant agrees with the limitations Sunil Bansal, M.D. recommended.

Claimant was asked during the hearing about whether he talked to anyone at Hallett about Dr. Phillips' recommendation for surgery in January 2016. Claimant said,

> A. No, because I - - he didn't state that it was a - - I had asked him if he thought it was a workers' comp or if it was - - I'm not real familiar with overuse or any of these other terms they use, and he asked me if I had an incident at work, and I said not to my knowledge, no. And so he said, okay, and that was as far as it went. And so I didn't think anything of it as far as maybe it was just - - because he thought maybe

it was a strain in the lower part of the back, is the way - - if I remember right - - that he had explained that it was a strain, and then that's why he was hoping the shots would help and the packs, I believe.

Q. But he had told you at that appointment that you probably need surgery; correct:

A. I would probably need it, yes, but it wasn't an absolute, no.

Q. And your only contact with the employer at that time was regrading a dispute over insurance coverage for that particular surgery; correct?

A. Yes.

(Tr. p. 107)

Claimant has requested payment of medical expenses in the amount of $242,881.62. (Ex. 3, pp. 33, 34)

Scott Bohm, safety manager at Hallett testified at the hearing. Mr. Bohm is in charge of safety training. Mr. Bohm also trains employees on how to report work injuries and fill out incident reports. Mr. Bohm provided this training to claimant. (Tr. 136) Mr. Bohm testified the first day he was aware that claimant had a work injury to his back was the day he received the petition filed by claimant's attorney. (Tr. p. 145) Mr. Bohm said he probably received the petition a couple of days after May 4, 2017, the day the petition was filed. (Tr. p. 151) Mr. Bohm agreed that claimant did not know if he had a work injury when he contacted the HR office in March 2017 to see how to appeal the insurance company's decision not to pay for surgery recommended by Dr. Phillips. (Tr. p. 154) Mr. Bohm's immediate supervisor is Mr. Timmer. Mr. Bohm had frequent contact with Mr. Timmer. Mr. Bohm testified Mr. Timmer has notified him if an employee reported an injury. Mr. Bohm stated that Mr. Timmer never informed him that claimant thought he might have a work injury. (Tr. pp. 144 -146)

Claimant saw his primary care physician, Dr. McQueen on November 18, 2015 with complaints of low back pain that had been present for about two weeks. Dr. McQueen noted claimant had a chronic history of lumbar disc syndrome. (JE. 2, p. 43) X-ray of the lumbar spine revealed significant degenerative changes to the lower lumbar region with prior fusion at L5-S1. (JE. 2, p. 4) Claimant was provided prescriptions and a follow-up appointment. (JE. 2, p. 43) Claimant returned to Dr. McQueen on December 17, 2015. Dr. McQueen wrote, "The patient works with some heavy construction equipment, and he has developed recurrent low back pain. . . . The patient has persistent chronic low back pain." (JE. 2, p. 46) Dr. McQueen provided a prescription, including hydrocodone-acetaminophen and noted claimant was going to visit his daughter for 30 days in Pittsburgh and if he was having ongoing problems when he returns he would recommend an MRI. (JE. 2, p. 46)

Claimant's spouse contacted Dr. McQueen's office on January 4, 2016 to request that Dr. McQueen arrange an MRI. (JE. 2, p. 49) On January 19, 2016 Dr. McQueen reviewed the results of the MRI with claimant. Dr. McQueen wrote,

> Patient in with history of chronic low back pain and multilevel degenerative disc disease. The patient had a recent MRI which was reviewed with him today. He has multilevel spondylosis and degenerative disc disease. He has foraminal impingement at multiple levels. Note the patient had spine surgery in Washington State over 10 years ago. He had a fusion at L5-L6. He is continuing to have low back pain and problems with radicular symptoms since moving to Iowa. Patient has a fairly rigorous job and does a lot of driving, lifting, and climbing. He has had more difficulty with his work over the last few months due to back pain and weakness of the lower extremities.

(JE. 2, p. 51) Dr. McQueen recommended claimant see a spine surgeon due to the complexity of his problem. (JE. 2, p. 51)

On January 27, 2016 Dr. Phillips examined claimant for low back pain and cramping in thighs and calves. Dr. Phillips noted the onset was May 2015. (JE. 3, p. 72) Dr. Phillips' comments were,

> Michael demonstrates complaints compatible with neurogenic claudication. He does get some relief while seated. He does have a considerable amount of back pain. Nonsurgical treatment options are not likely to be effective due to the amount of stenosis and his young age.
>
> I have proposed a decompression at L2-3, L3-4, and L4-5 with Coflex insertion at L2-3 and L3-4. L4-5 does not appear to move much and the spinous process is not amenable to a Coflex device. Risks, benefits, complications of such a surgery have been reviewed with the patient. This would avoid the alternative of an L2 to the sacrum fusion and in my experience has been very successful in patients with similar problems. He wishes to proceed.

(JE 3, p. 74)

On March 17, 2016 Dr. McQueen saw claimant for medication. Dr. McQueen noted that claimant was having difficulty getting his insurance to pay for the surgery Dr. Phillips recommended. Dr. McQueen wrote,

> Apparently his insurance is giving him some static regarding the type of surgery he can do, but it only makes sense for this patient to do a procedure that offers him a quick recovery time so he can get back to his regular work activity.

(JE. 2, p. 54) Claimant saw Dr. McQueen on May 23, 2016 after he had been terminated by Hallett for a medication refill. Dr. McQueen wrote,

> The patient notes that he has recently lost his job when he told his employer about his need for lumbar disc surgery. They apparently eliminated his job. From his description of the situation, it sounds like they eliminated the job in order to avoid dealing with his long-term medical issues, which we feel were job related through the years. The patient has severe lumbar disc degenerative disease with chronic low back and lower extremity pain. He has seen Dr. Phillips at the Nebraska Spine Center and he has recommended corrective surgery in the near future.
>
> In reviewing the case, it would appear that the company has decided to eliminate the job after they found that he would need extensive surgery and would be off for a fair amount of time for rehabilitation [1]

(JE 2, p. 58) Claimant was examined by Sarkis Kaspar, M.D. on March 7, 2017.

Dr. Kaspar noted that a year ago claimant was lifting a bundle of wire and had some back pain that never improved and that about four months ago the pain started going down his legs all the way to the heels. Dr. Kaspar did not think the fusion in 1997 was the cause of claimant's current symptoms. (JE. 2, p. 64) Dr. Kaspar did not agree with the fusion surgery recommended by Dr. Phillips, and noted that claimant would be best served with a laminectomy or a staged fusion if claimant's condition did not improve. (JE. 2, p. 65)

On April 13, 2017 Dr. Gachiani examined claimant. Dr. Gachiani's assessment and plan was,

> **Assessment**
>
> 1. Lumbar stenosis with neurogenic claudication.
>
> Lumbar spondylosis with claudication.
>
> **Plan**
>
> L2-3 discectomy. L2-3 L3-4 and L4-5 laminectomy bilateral medial facetectomy bilateral foraminotomy.

(JE. 4, p. 79) On March 23, 2018 Dr. Gachiani performed a number of surgical procedures on claimant's spine. The procedures include,

[1] I make no finding in this decision concerning the motivation for claimant's termination by the employer.

1. Intraoperative neuromonitoring for SSEP and EMG.

2. Bilateral L2, L3, L4 pedicle screw fixation using 7.5 x 60 mm screws, bilateral L5 pedicle screw fixation using 5.5 x 60 mm screw on the left and 6.5 x 60 mm screw on the right.

3. Bilateral rod fixation using 100 mm lordotic contoured rods.

4. L2-3, L3-4, L4-5 bilateral decompressive laminectomy, medial facetectomy with complete superior and inferior L3-L4, inferior L2, and superior L5 facectectomies.

5. L2-3, L3-4, L4-5 interbody fusion using NuVasive titanium expandable 9 x 11 x 31, 15 degree cages, filled with Osteocal Pro. Interbody fusion L2-3, L3-4, L4-5 using patient's morcellized autograft.

6. Bilateral L2-L5 posterolateral fusion using patient's morcellized autograft and autologous bone.

7. L3-4 cross connector placement.

(JE 4, p. 85) The postoperative diagnosis was, "L2-3, L3-4, L4-5 bilateral foraminal stenosis, central stenosis with bilateral radiculopathy and neurogenic spinal claudication." (JE 4, p. 85] Claimant was discharged from the hospital on March 27, 2018. On June 20, 2018 Dr. Gachiani noted claimant was status post lumbar fusion doing well with some numbness at the right L3 distribution. Dr. Gachiani gave claimant a prescription for physical therapy and said claimant had been cleared to gradually return to full activity. (JE. 4, p. 111) I find this is the date that claimant reached maximum medical improvement. I find this surgery is related to claimant's April 2016 back injury.

On April 24, 2017 Wade Jensen, M.D. performed an independent medical examination (IME). Dr. Jensen noted,

> He remembers one event in June where he felt a little pop in his back. It slowly improved with chiropractic care and conservative measures. He had been through episodes like this in the past. In fact, his previous chiropractic records have multiple treatments for similar episodes and complaints of low back pain and conservative care. Sometimes he would go months without seeing the chiropractor. Other times, it would be weeks between visits. His last few visits were 05/07/2013 with some left-sided low back pain, 10/13/2013 for neck pain and mid and low back pain, increasing back pain and went ahead and went for further visits, saw Dr. McQueen, went through some chiropractic treatments. They ultimately referred him to Dr. Phillips who noted that this was not a work-related event, that it looked more degenerative in nature despite his history of

having a previous L5-S1 fusion for an isthmic spondylolisthesis in 1997.

(Ex. B, p. 7) Dr. Jensen's assessment was,

1. Multilevel lumbar degenerative disk disease L2-3, L3-4, and L4-5 with severe low back pain.

2. Lumbar spinal stenosis with neurogenic claudication, symptomatic, worst at the L2-3 level, moderately severe at the L3-4 level, and mild-to-moderate at the L4-5 level.

3. L5-S1 level fusion healed for isthmic spondylolisthesis.

(Ex. B, p. 8) Dr. Jensen said claimant has multilevel degenerative disk disease at L2-3, L3-4, and L4-5 with the L2-3 level the worst. Dr. Jensen stated that claimant's condition was not causally related to his work at Hallett and that claimant does not have classic adjacent level degeneration. Dr. Jensen states claimant's condition is a primarily degenerative condition. (Ex. B, p. 8) Dr. Jensen said claimant needed further surgical treatment to stabilize his spine. (Ex. B, p. 8)

On August 30, 2018 Dr. Bansal performed an IME. Dr. Bansal stated that claimant's back injury in 1997 started the sequence of events with claimant's back as well as the heavy lifting claimant had to perform. (Ex. 2, p. 19) Dr. Bansal's diagnosis was, "Aggravation of multi-level lumbar spondylosis. Status post bilateral L2 to L4 fusion." (Ex 2, p. 22) Dr. Bansal wrote concerning causation,

> In my medical opinion, Mr. Triplett aggravated his multi-level lumbar spondylosis and facet arthropathy due to his repetitive heavy lifting performed at Oldcastle Materials Group for 30 years coming forward to April 2016.

(Ex. 2, p. 22) Dr. Bansal provided a 22 percent whole body impairment rating due to the fusion surgery and recommended restrictions of occasionally lifting 25 pounds and up to 15 pounds frequently, no frequent standing greater than 30 minutes and no frequent bending or twisting. (Ex. 2, p. 24) I find these are claimant's restrictions. Dr. Bansal charged $564.00 for the examination and $2,404.00 for the report for a total of $2,968.00. (Ex. 2, p. 25)

On November 16, 2018 Dr. Jensen wrote to defendants' attorney after reviewing additional medical records and the IME performed by Sunil Bansal, M.D. Dr. Jensen maintained his opinion that claimant's condition was degenerative and was not caused by claimant's work at Hallett. (Ex. C, p. 10) Dr. Jensen did not believe the medical article referred to by Dr. Bansal was on point as to the issue of whether adjacent level disease has any impact on further degeneration. (Ex. C, p. 10) Dr. Jensen stated,

> I maintain my position that the patient has multiple level degenerative disk disease lumbar spine and development of significant multilevel stenosis, which drove the need for surgery. This was not an adjacent level disease and this was not a problem of work-related cumulative events with time.

(Ex. C, p. 11)

On December 6, 2018 Dr. Bansal reviewed additional medical reports and also commented on Dr. Jensen's November 16, 2018 letter/report. Dr. Bansal disagreed with Dr. Jensen's conclusions especially as to how Dr. Bansal believed Dr. Jensen viewed cumulative trauma injuries and workers' compensation claims. (Ex. 2, p. 29) Dr. Bansal maintained his opinions from his IME. (Ex. 2, p. 30) Dr. Bansal charged $356.00 for this letter/report. (Ex. 2, p. 32)

The parties agreed claimant had been paid $12,876.21 for a four percent body as a whole injury claimant suffered to his back in 1996 while employed by Hallett. (Hearing Report)

CONCLUSIONS OF LAW

NOTICE

The first issue to be determined is the appropriate date of claimant's cumulative injury and if claimant provided notice.

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 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 have known 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).

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).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know his injuries are both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980). The statute of limitations also does not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on his employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Disability is found to have manifested when an employee has knowledge of a permanent impairment of the injury, and the causal impact the injury would have upon a job. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997). The date of surgery has been used as a date of injury in some cumulative injury cases. Wetzell v. Packaging Corporation, File Nos. 5000444, 5000445 (App. 2003). The last day of work for an employee has also been used in other cumulative injury cases as the date of injury. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992). The last day of employment has been found to be an appropriate manifestation date, for some cases, because whatever impact the injury and disability will have on the employee's employability manifests itself when the employee leaves the employer's workforce. Meier v. John Deere Dubuque Works of Deere & Company, File No. 5002128 (App. July 22, 2004).

Based on the law detailed above, the manifest date of injury is when claimant knew, or should have known, the injury was work-related; and when the employee knew or should have known the injury was serious. An injury is considered serious, for the date of manifestation, when physical condition has a permanent adverse impact on the employment.

The discovery rule is applicable to workers' compensation claims. Baker, 872 N.W.2d at 680-81. Under the discovery rule, the limitations period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Id. at 684-85. Thus, the claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000). The Iowa Supreme Court has held:

> [u]nder the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable diligent investigation.

> Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted).

The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness component of the test is satisfied." Id. at 651.

The claimant knew he had a serious back condition when Dr. Phillips told him on January 25, 2016 that he needed fusion surgery. The question then becomes when did the claimant know or should have known of the possible compensability of the condition.

In this case, claimant testified he did not know that he had a work-related injury, as his physicians did not inform him that his condition might be work related. His private insurance did not raise an issue with claimant that the condition he was seeking treatment for could be work related. Claimant continued to work for Hallett with no restrictions until his termination on April 25, 2016. Dr. McQueen noted claimant worked with heavy equipment at work during the December 17, 2015 appointment. At that time however, Dr. McQueen decided to wait until the claimant returned from a trip in 30 days to see if he had improved before ordering an MRI. At that time the probable compensability of the injury was not known. Dr. Jensen noted that Dr. Phillips did not believe claimant's back condition was due to a work-related injury.

The May 23, 2016 note by Dr. McQueen is the first specific statement by a physician that the claimant's injury was related to work.

Claimant did not know or suspect his condition might be work related in early April 2016. He did not know that he had a compensable claim until he spoke to his attorney in late April 2016. I find that claimant discovered the possible compensability of his claim in the first week of April 2016. Based on this record, it is found the manifestation date of claimant's injury was April 1, 2016. This is when claimant informed Mr. Timmer that he thought he might have a work injury and knew he was to have surgery for a possible work-related injury.

I find that claimant informed Mr. Timmer in early April 2016 about a potential work injury. Claimant testified under oath about a conversation with Mr. Timmer where he told Mr. Timmer his back condition might be work related. Mr. Timmer did not testify or submit a statement.

Defendants have not proven by a preponderance of the evidence the claimant failed to provide timely notice or filed a claim within the statute of limitations.

CAUSATION

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)

The evidence shows claimant had multiple level degenerative disk disease prior to his back injury in April 2016. I find the convincing evidence is that claimant's work at Hallett lighted-up and accelerated claimant's degenerative back condition. Dr. Jensen

noted that claimant does not have typical adjacent level disease related to his 1997 fusion. That being the case it does not address whether claimant's degenerative condition was accelerated by his work at Hallett. I find Dr. Bansal's opinions and explanation of the mechanism of claimant's back condition to be more convincing. Dr. McQueen also was of the opinion that claimant's work contributed to his back condition. Claimant has proven by a preponderance of the evidence that he has a cumulative trauma injury.

EXTENT OF DISABILITY

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant was 64 years old at the time of the hearing. He had a long history of working for Hallett as an electrician. He worked in the Navy as an electrician. Claimant was able to work part-time driving a school bus for about one year, but quit due to back pain. Claimant tried to drive a truck hauling gravel and was only able to perform this work for about two weeks due to back pain. At the time of the hearing claimant was living in Washington and was not looking for work. The only functional limitations are those issued by Dr. Bansal for the three-level fusion claimant had in March 2018.

Claimant is an experienced industrial electrician. He does not have a significant history of sedentary to medium work. Claimant was not a supervisor.

Considering all the factors of industrial disability I find claimant has a 75 percent loss of earning capacity. I find claimant has a 75 percent industrial loss.

HEALING PERIOD BENEFITS

Claimant has requested healing period benefits from March 23, 2018 through August 30, 2018.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

As the claimant had his fusion surgery on March 23, 2018 and reached MMI on June 20, 2018, I find that claimant is entitled to intermittent healing period benefits from March 23, 2018 through June 20, 2018.

The Iowa Supreme Court has specifically noted that permanent partial disability benefits commence whenever the *first* of three factors in Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In other words, once a claimant achieves one of the factors outlined in Iowa Code section 85.34(1), permanent disability benefits should commence.

The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code section 85.34(1).

Claimant started working driving a bus for the OABCIG School District in October 2016. I find that October 1, 2016 is the date of commencement for permanent partial benefits.

CREDIT

Defendants have requested a credit for the payment of the 1996 back injury. Iowa Code section 85.34 (7) (2016) provides in part,

> *b.* (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in

> relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> ...
>
> *c.* A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

The record is undisputed that defendants paid claimant a four percent whole body impairment rating for the claimant's 1996 back injury. Claimant was working for Hallett at that time.

Defendants are entitled to a four percent credit. The defendants shall pay claimant three hundred fifty-five weeks of permanent disability benefits (75 percent – 4 percent = 71 percent. 500 weeks x 71 percent = 355 weeks).

MEDICAL COSTS

Claimant has requested payment of medical expenses found in Exhibit 3.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

I find that the medical expenses listed in Exhibit 3 are causally related to claimant's April 1, 2016 work injury. Defendants shall pay claimant the expenses he has paid out of pocket and reimburse the providers or insurance carriers listed in Exhibit 3.

COSTS

Claimant has requested the cost of Dr. Bansal's IME, Dr. Bansal's subsequent reports and filing fees. Iowa Code section 85.39 (2016) provides in part,

> 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.

Dr. Jensen performed an IME on April 24, 2017 at the request of the defendants. Dr. Bansal performed his IME on August 30, 2018. I find the cost of Dr. Bansal's IME to be reasonable and find that claimant is entitled to payment of $2,968.00 for this expense.

Claimant has also requested costs for the filing fee of $100.00 and Dr. Bansal's report of December 6, 2018 of $356.00. Using my discretion under 876 IAC 4.33 I award these costs. Defendants shall pay claimant $456.00 in costs.

ORDER

Defendants shall pay healing period benefits from March 23, 2018 through June 20, 2018 at the weekly rate of eight hundred forty-five and 98/100 dollars ($845.98).

Defendants shall pay claimant three hundred fifty-five (355) weeks of permanent partial disability benefits commencing October 1, 2016 at the weekly rate of eight hundred forty-five and 98/100 dollars ($845.98).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay the medical cost found in Exhibit 3.

Defendants shall pay the cost of Dr. Bansal's IME in the amount of two thousand nine hundred sixty-eight and 00/100 dollars ($2,968.00).

Defendants shall pay costs of four hundred fifty-six and 00/100 dollars ($456.00).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 7th day of June, 2019.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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.