BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAYA BAJGAI,

Claimant,

vs.

MARZETTI FROZEN PASTA, INC.,

Employer,

and

TRAVELERS INDEMNITY COMPANY and ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5051657, 5056031

APPEAL DECISION

Head Note Nos.: 1108, 1803, 4000

Defendants, Marzetti Frozen Pasta (hereinafter referred to as "Marzetti") and Ace American Insurance Company (herein after referred to as "Ace"), timely appeal from an arbitration decision filed on December 19, 2016. Claimant, Daya Bajgai, timely cross-appeals against Marzetti and Ace in File No. 5056031. Claimant also filed a notice of appeal against Marzetti and Travelers Insurance Company (hereinafter referred to as "Travelers") in File No. 5051657. Defendants Marzetti and Travelers respond to the appeal but do not seek cross-appeal.

On June 28, 2018, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I have performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner.

Defendants, Marzetti and Ace, contend the presiding deputy erred in six respects:

(1) Concluding that claimant's claim in File No. 5056031 was not barred by the statute of limitations, but instead, that the statute of limitations was tolled by the discovery rule.

(2) Awarding healing period benefits against defendants, Marzetti and Ace.

(3) Awarding an excessive industrial disability.

(4) Awarding medical expenses against Marzetti and Ace.

(5) Awarding claimant's independent medical evaluation expenses against Marzetti and Ace.

(6) Awarding penalty benefits against Marzetti and Ace.

Claimant responds to the appeal by Marzetti and Ace, asserting that the arbitration decision should be affirmed in its entirety. However, claimant advances an alternative argument. Specifically, claimant asserts that, if the undersigned finds the 2012 injury date is barred by the statute of limitations, then claimant should be found to have sustained a permanent aggravation of his underlying injury as a result of the August 19, 2014 work injury and should be awarded industrial disability benefits against Marzetti and Travelers.

Marzetti and Travelers respond to claimant's appeal in File No. 5051657. They argue that the arbitration decision correctly found the August 19, 2014 injury to be a temporary aggravation and urge that the arbitration decision be affirmed in all respects in that file.

FINDINGS OF FACT

Having reviewed the evidentiary record de novo, considered the underlying arbitration decision, as well as the arguments of the parties in their appellate briefs, I enter the following findings of fact:

Claimant, Daya Bajgai, asserts claims against Marzetti for two dates of injury. In a petition filed January 30, 2015, claimant asserted an injury date of August 19, 2014. This is contested case File No. 5051657.

Claimant filed a second petition on January 15, 2016, alleging an August 1, 2012 injury date. (Transcript, page 92) Both petitions allege injuries to claimant's low back. The presiding deputy commissioner found that claimant sustained a permanent injury to his low back as a result of the August 1, 2012 injury. (Arbitration Decision, p. 9) However, the presiding deputy commissioner found that claimant sustained only a temporary aggravation of his low back condition as a result of the August 19, 2014 work injury. (Arbitration Decision, p. 10) As will be discussed further, I accept and concur with these findings of fact by the presiding deputy commissioner.

I also acknowledge and accept the presiding deputy commissioner's observations of claimant at the time of the arbitration hearing. The presiding deputy commissioner found:

> Mr. Bajgai appeared sincere, but his testimony on some aspects was conflicting and confusing which will be discussed further below. I do not know if this was the result of an inability to adequately express himself in the English language, that he is a poor historian, or a combination of both. I do not find these conflicting statements to be an indication of dishonesty.

(Arbitration Decision, p. 3)

Mr. Bajgai stated that he is able to read and write in English and grew up speaking English. He taught English along with math, while living at a refugee camp in Nepal before immigrating to the United States. He testified in English without an interpreter. However, the presiding deputy commissioner noted that claimant:

> has considerable difficulty getting people to understand him due to a thick accent. His testimony as reported in the deposition and hearing transcripts at times was disjointed and contained incorrect sentences and use of words. I do not know if this was a lack of fluency in English or the court reporter's difficulty understanding Mr. Bajgai's testimony.

(Arbitration Decision, p. 3)

The presiding deputy commissioner found that claimant's English skills were rudimentary at best. I accept that claimant has a thick accent and the transcripts demonstrate difficulties in understanding the claimant at times. However, I do not agree with the presiding deputy commissioner's assessment that claimant's English skills are rudimentary, that he was somehow manipulated during questioning, or that he was unable or unwilling to disagree with leading questions posed by counsel at the hearing.

Claimant is an educated man and, when appropriate, contradicted even his own attorney's leading questions. (Tr. pp. 38, 68) He certainly provided some confusing testimony at times, but I do not accept that claimant's testimony is suspect or that any inconsistencies should be resolved in claimant's favor, simply because he had an accent and the attorneys utilized more leading questions while questioning him. On certain issues, claimant was very clear and consistent in his testimony, as will be discussed below.

In September 2010, Mr. Bajgai began working at the Marzetti production plant in Altoona, Iowa, as an employee of a temporary agency, Jacobsen Staffing. He was hired by Marzetti for permanent, full time employment in June 2011 and he continued in that employment until he resigned on May 7, 2015. (Tr. pp. 13-14, 58) As stipulated, his last day of actual work at Marzetti was September 18, 2014. (Tr. p. 49)

Mr. Bajgai testified that his job at Marzetti involved rotating between jobs. Three days a week he was assigned to production work and the remaining two days he

worked in packaging. He also drove a forklift and operated a Demanco machine. (Tr. p. 14)

In production work, he was required to lift 50 pound sacks of flour and other bags of ingredients weighing up to 30 pounds frequently (16 to 20 times per shift) to fill a mixing machine to produce pasta dough. He then had to push a wheeled dough mixing table weighing around 800 pounds to the production line. He did this approximately 16 to 18 times per shift. (See generally, Tr. pp. 15-17; Ex. 15, p. 176; Ex. 19, pp. 250-251)

In packaging, he was required to build tote boxes, fill the boxes and load them onto pallets and move the loaded pallet with a pallet jack. The boxes weighed 31.4 pounds and he had to stack them from the bottom of the pallet to a level over his head. A loaded pallet was 600 to1000 pounds. He also stacked empty pallets. (See generally, Tr. pp. 18:19; Ex. 15, p. 176; Ex. 19 pp. 250-251)

Mr. Bajgai said that the production work was heavier work than packaging work. (Tr. p. 17) With the installation of a palletizing machine in 2014, the lifting of boxes in the packaging work only occurred when the machine failed to operate. (Tr. p. 20) Mr. Bajgai states that this type of work continued throughout his employment at Marzetti.

The two stipulated work injuries primarily involved the right side of the low back and the right leg. Mr. Bajgai denies any prior treatment or activity limitations from back problems before these work injuries. (Tr. p. 26) There are no records in evidence to suggest otherwise.

The first injury on August 1, 2012 occurred when Mr. Bajgai experienced the onset of right-sided low back and right shoulder pain after lifting a box overhead while palletizing in the packaging portion of his job. (Tr. p. 27) The second injury date, August 19, 2014, Mr. Bajgai experienced an increase in his low back pain and he had trouble getting out of bed. (Tr. pp. 39-40) He states there was no specific incident at work the day before this onset of increased symptoms. Mr. Bajgai testified that he attributes the second low back injury to heavier and faster-paced work along with additional overtime work prior to August 19, 2014. (Tr. p. 41)

The authorized, primary treating physician after the August 1, 2012 injury was Nicholas Bingham, M.D., a specialist in occupational medicine. The initial pain complaints involved not only the low back, but also the neck and right shoulder. Dr. Bingham's assessment was cervical trapezius/dorsal lumbar strain with radicular components. The doctor prescribed medications, physical therapy and work restrictions. Mr. Bajgai only lost one day of work as the restrictions were accommodated by Marzetti. The doctor also ordered an MRI, which he stated shows a normal spine. On September 10, 2012, Dr. Bingham released Mr. Bajgai from his care and recommended a return to full duty work. (Ex. 2, p. 12) Although Mr. Bajgai continued to complain of low back pain when he was released, the doctor stated that

any remaining pain will pass and the injury appears to be merely musculoskeletal in nature. (Id.)

The presiding deputy found:

> Claimant confusingly testified that Dr. Bingham told him that the injury was not serious, but that his back injury will not heal and he would continue to have ongoing pain. (Tr. p. 107) He said this while attempting to explain what another doctor told him after the 2014 injury and I think he was confused as Dr. Bingham's reports are clear that he thought the musculoskeletal injury would subside.

(Arbitration Decision, p. 5) I do not agree with or accept this finding by the presiding deputy commissioner. Claimant clearly testified in both his deposition and at the arbitration hearing that he believed his back injury was serious, that it may affect his ability to continue working, and that the doctor told him his pain symptoms may not resolve. (Tr. pp. 96-97, 107; Ex. 17, pp. 23-24)

In fact, claimant answered a series of questions dealing with this issue and was not "confused" when testifying about when he believed his 2012 injury would affect his employment. Rather, claimant was quite clear that he knew, or believed, by September 2012 that his back symptoms were caused by a work injury in August 2012, that the back condition was serious and may not resolve, and that the back condition may affect his ability to continue to work. (Tr. pp. 96-97; Ex. 17, pp. 23-24)

Admittedly, Mr. Bajgai only missed one day of work after the August 2012 injury. He continued in light duty for a short time and then returned to full duty work on September 20, 2012. He worked at full duty for Marzetti from September 20, 2012 through August 18, 2014. (Tr. pp. 36-38)

However, Mr. Bajgai testified that after he was released from medical treatment by Dr. Bingham and returned to work, his low back and leg pain did not resolve. Instead, his symptoms continued to wax and wane throughout the balance of 2012, 2013 and into 2014 until August 19, 2014. Mr. Bajgai reports that his pain during this period of time was not as bad as it was on August 1, 2012, but it did not completely go away either. (Ex. 17, p. 26) As noted, claimant stated that the pain waxed and waned from August 2012 through August 2014. Claimant testified that he was concerned that it would interfere with his employment as early as September 2012. (Tr. p. 98)

As stated before, the second injury on August 19, 2014 arose when Mr. Bajgai had trouble getting out of bed due to low back and leg pain and nothing happened specifically the day before to cause the pain. Mr. Bajgai is asserting a gradual or cumulative injury from work leading up to that date. As stated before, Mr. Bajgai believes that his pain became intolerable as a result of heavier and more fast-paced work and long hours at Marzetti immediately prior to this onset of pain. (Tr. pp. 41-42)

After reporting his pain to Marzetti management, he was referred for treatment to a DoctorsNow clinic and was seen immediately by Kara Buckingham, PA. Ms. Buckingham records a history of constant low back pain since a work injury on August 1, 2012 and a reinjury/worsening of pain on August 19, 2014. Her assessment was lumbosacral sprain/strain. Her treatment consisted of prescription medications and limited work duty. (Ex. 3, pp. 14-17)

Mr. Bajgai testified that he previously scheduled an appointment on August 19, 2014 with his primary care provider, Malhar Gore, M.D., at Broadlawns Hospital, for a skin condition. During this visit, Dr. Gore addressed the back problem and reported the following history:

> Brings previous medical records with him. States he was injured at work in August 2012. A lot of lifting and pushing and pulling of 30 and 50 pound bags. He mixes flour, eggs and water to make dough. He was injured because of awkward lifting position. His company sent him to an occupational medicine specialist. He did rehabilitation. Did not improve much and also had neck and lumbar spine MRIs done which were read as normal. He did not tolerate pain medications much. Improved and continued to work however complains that he can't do that sort of work anymore because of chronic pain at 4-5 level daily. Sometimes it's worse that [*sic*] he can't even get out of bed but those are rare occasions.

(Ex. 4, p. 19)

The doctor added as follows:

> Long discussion ensued about further options. States that he would like to continue to work there but he just cannot do that sort of work because it worsens his lack [*sic*] continuously. We discussed various options. I suggested he speak with human resources at his work and detail these things to them. Perhaps they may be what [*sic*] find other type of job for him.

(Id.)

Dr. Gore also recommended work restrictions of no kneeling; no bending over; and no lifting or pushing/pulling over 20 pounds. (Ex. 4, p. 23)

In a letter dated August 22, 2014 from defendant Travelers' claims adjuster, Mr. Bajgai was advised that Travelers was unable to accept his claim for workers' compensation benefits. (Ex. 18, p. 215) According to this letter, the decision to deny the claim was based on the information they received that Mr. Bajgai injured his back in August 2012 and there was no new injury and no evidence of a material aggravation of

the prior injury. (Id.) There was no specific reference to the type or nature of the information received.

Mr. Bajgai returned to physician assistant Buckingham on August 26, 2014. There was no change in the history, assessment or treatment plan and work restrictions were continued. (Ex. 3, pp. 17-18)

Mr. Bajgai testified that he had a conversation with a member of Marzetti management at this time about his physician-imposed restrictions by Buckingham and Dr. Gore and was told that further treatment was being denied because there was a change in insurance carriers and that his back injury in 2012 was at the time of coverage by a different insurer. (Tr. p. 44) He also was told that Marzetti would not accommodate for the new restrictions and he would have to apply for short-term disability benefits. (Tr. p. 50-51) On October 20, 2014, Mr. Bajgai's attorney received an email communication from a Marzetti manager indicating they considered his back injury unrelated to work, indicating that the company would not accommodate for his restrictions. (Ex. 18, p. 241) Mr. Bajgai thereafter applied for and received short-term disability benefits as stipulated in the hearing report.

On October 3, 2014, Mr. Bajgai began treating on his own with Daniel McGuire, M.D., an orthopedic specialist at Broadlawns. There is little information as to history, assessments and any prescribed treatment modalities contained in the Broadlawns' records of his treatment. In response to an inquiry from Mr. Bajgai's counsel, Dr. McGuire agreed that the diagnoses are low back pain and muscle strain; heavy, repetitive lifting at Marzetti was a significant causative or contributing factor to his current back condition; he was restricted from lifting greater than 20 pounds with minimal bending and twisting; and, that as of December 29, 2014, Mr. Bajgai had not achieved maximum medical improvement (MMI). (Ex. 5, pp. 61-62)

On April 13, 2015, Dr. McGuire released Mr. Bajgai to return to work without restrictions and from his care with continued home exercises. (Ex. 5, p. 70) Mr. Bajgai testified that despite the release to full duty, Dr. McGuire recommended that he seek lighter duty. (Tr. p. 56)

Mr. Bajgai testified that he then returned to Marzetti after his release by Dr. McGuire and apparently inquired about a return to work. He was told that this would require a medical fitness for duty evaluation. Mr. Bajgai declined to submit to the fitness for duty evaluation, stating that he could no longer perform the same job he previously had due to his back problems. Mr. Bajgai then submitted his resignation, effective May 7, 2015. (Ex. 19, p. 271)

At the request of defendants, Marzetti and Travelers, Mr. Bajgai was evaluated on August 27, 2015 by John Kuhnlein, D.O., an occupational medicine specialist. Based on consistent statements made to the doctor that his symptoms returned back to the way they were before August 19, 2014, Dr. Kuhnlein opines in a report dated

November 30, 2015 that Mr. Bajgai suffered an initial injury on August 1, 2012 from his work at Marzetti, but he did not suffer a new permanent injury on August 19, 2014. (Ex. 12, p. 136)

Dr. Kuhnlein opined that Mr. Bajgai suffered a temporary aggravation of a pre-existing condition on August 19, 2014 taking him off work. Dr. Kuhnlein further opined that claimant reached maximum medical improvement (MMI) from this temporary aggravation on March 10, 2015. (Ex. 12, p. 136) In this respect, Dr. Kuhnlein stated:

> I did ask Mr. Bajgai if his symptoms had returned to their pre-August 2014 baseline, and he says that they did, and his symptoms returned back to the way they were before this August 19, 2014 flare. I asked Mr. Bajgai this in different ways during the examination, and the response was consistent. Mr. Bajgai sustained a temporary aggravation of his pre-existing chronic low back pain on or about August 19, 2014, that returned to its baseline status from the August 1, 2012, injury. There was no new injury on August 19, 2014, other than the temporary aggravation caused by his work activities.

(Ex. 12, p. 136)

Dr. Kuhnlein further opined that the original injury in August 2012 is a cause of a 5 percent permanent partial impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and there was no additional impairment from the August 19, 2014 aggravation. (Id.) He then recommended permanent restrictions against lifting over 30 pounds from floor to shoulder and against lifting more than 20 pounds, occasionally, over shoulder level; able to sit, stand and walk as needed if he is able to change positions; and only squat or bend occasionally. (Ex. 12, pp. 136-137)

At the request of his counsel, Mr. Bajgai was evaluated on December 4, 2015 by Sunil Bansal, M.D., another occupational medicine specialist. In his report of the same date, Dr. Bansal agrees with Dr. Kuhnlein that Mr. Bajgai's heavy work at Marzetti was a cause of the August 1, 2012 injury, but unlike Kuhnlein, Dr. Bansal opines the continued work at Marzetti led to a permanent worsening of his back condition with a manifestation date of August 19, 2015. (Ex. 13, p. 160) The doctor opined that Mr. Bajgai suffers from a 6 percent permanent partial impairment to the body as whole under the AMA Guides. (Ex. 13, p. 161) He apportions this rating by attributing 3 percent to the August 1, 2012 injury and 3 percent to the August 19, 2014 aggravation injury. (Id.)

Dr. Bansal recommends permanent restrictions of no lifting over 30 pounds occasionally and no lifting over 20 pounds frequently. (Id.) He placed Mr. Bajgai at maximum medical improvement (MMI) on April 3, 2014, the last visit with Dr. McGuire, from the aggravation injury. (Id.) The doctor did not discuss claimant's history provided

to Dr. Kuhnlein concerning the return of his symptoms to baseline after completing his treatment with Dr. McGuire.

Obviously, Dr. Kuhnlein and Dr. Bansal's opinions are inconsistent with respect to the effects of and permanency related to each of the injuries. However, claimant provided some revealing insight into the respective credibility of these physicians. During his deposition and again at hearing, Mr. Bajgai testified that Dr. Kuhnlein's medical history and understanding of claimant's injuries was more accurate than Dr. Bansal's history and understanding. In other words, Dr. Kuhnlein's report is accurate when it states that claimant's back and leg symptoms returned to the baseline that existed before August 19, 2014 after completing treatment for the second injury date. (Tr. p. 78, Ex. 17, p. 37)

At the request of defendants Marzetti and Ace, Mr. Bajgai was also evaluated shortly before hearing by another physician, William Boulden, M.D., an orthopedic surgeon. In his report dated September 8, 2014, Dr. Boulden disagrees with both Drs. Kuhnlein and Bansal stating that since there are no objective findings on physical examination, there should be no permanent impairment rating and that claimant's injury on August 1, 2012 reached MMI on September 10, 2012 as opined by Dr. Bingham and Mr. Bajgai suffered no permanent impairment from either of his work injuries.

Considering the respective competing medical opinions, I find that the opinions offered by Dr. Bingham were proven to be inaccurate. His prediction of full resolution of symptoms was contradicted by what he told claimant and by the reality of claimant's ongoing symptoms after the August 2012 injury. Dr. Boulden's opinions do not explain the continuation of symptoms from August 2012 through the date of the arbitration hearing. In essence, Dr. Boulden opines that claimant's injuries are temporary, yet they persisted from August 2012 through date of hearing in October 2016. Similar to Dr. Bingham's predictions, I do not find Dr. Boulden's opinions convincing in this situation.

When considering the opinions of Dr. Kuhnlein and Dr. Bansal, I accept claimant's testimony that Dr. Kuhnlein's opinions are based upon an accurate history. While I understand Dr. Bansal's analysis and ultimate opinion that the August 2014 injury caused a permanent aggravation of claimant's condition, I find it troubling that claimant testified he told Dr. Bansal he returned to his pre-August 2014 symptom baseline and that fact shows up nowhere in Dr. Bansal's report.

Similarly, Dr. Kuhnlein's report clearly states that claimant's symptoms returned to pre-August 2014 baseline. Dr. Bansal identifies Dr. Kuhnlein's report as a medical record he reviewed. Yet, Dr. Bansal makes no comment about this return to baseline of symptoms referenced by Dr. Kuhnlein.

Dr. Bansal does make one intriguing analysis and argument that could carry the day, if it had been more fully developed. Dr. Bansal notes in a supplemental report dated September 22, 2016, that "there has been a change in his lumbar MRI findings

from 2012 to the above recent MRI, specifically the finding of an L5-S1 disc protrusion." (Ex. 13, p. 165) Dr. Bansal opines that this change in the MRI would be consistent with a material aggravation of the lumbar spine from the 2014 injury date. Certainly, this could make sense.

However, it appears that the radiologist reviewing the 2016 MRI was not aware of the 2012 lumbar MRI. The comparison film the radiologist had available to him was a plain x-ray dated March 10, 2015. (Ex. 11, p. 125) It does not appear that Dr. Bansal attempted to interpret these MRI films independently and the radiologist in 2016 clearly did not perform any comparison. While a change in the MRI could provide convincing evidence of a material aggravation or permanent injury in 2014, I find that claimant did not prove such a change in the MRI or that a material or permanent aggravation occurred as a result of the August 2014 injury date.

Instead, I find Dr. Kuhnlein's opinions most credible and accept those opinions as accurate. I find that Mr. Bajgai suffered a partial injury to his low back and the permanent work restrictions recommended by Dr. Kuhnlein as a result of his chronic low back and right leg symptoms of pain and numbness which were solely caused by the injury at Marzetti on August 1, 2012. This finding is consistent with Mr. Bajgai's repeated statements to providers and at hearing that his current symptoms are the same as those that existed prior to a flare-up of his symptoms on August 19, 2014.

I find that Mr. Bajgai suffered a temporary aggravation of his back injury on August 19, 2014, as a result of increased heavy work over time at Marzetti. This aggravation was a gradual or cumulative trauma injury which manifested on August 19, 2014. The August 19, 2014 injury was a cause of Mr. Bajgai's absence from work due to Marzetti's refusal to accommodate for the physician-imposed work restrictions from August 19, 2014 through April 3, 2015, upon his release by Dr. McGuire. For the reasons previously stated, I have already accepted Dr. Kuhnlein's opinions as the most credible in this case. Therefore, I also accept his assessment that claimant reached maximum medical improvement after the temporary aggravation on March 10, 2015. (Ex. 12, p. 136)

Defendants Marzetti and Ace contend that claimant's petition for the August 2012 injury date is barred by the statute of limitations. Claimant stipulated that no weekly benefits were paid for the 2012 injury date and that the petition was filed on January 15, 2016.

Although he filed the petition more than two years after the August 1, 2012 injury date, claimant contends that the discovery rule should be applied and toll the statute of limitations. Claimant provided clear and relevant testimony on this issue. Claimant's testimony was as follows:

Q: Okay. At the time that you reviewed the MRI results with the doctor, were you concerned at that time that you had an injury to your back that was serious?

A: Yes, sir.

Q: And at the time you reviewed the MRI results with the doctor, you believed that it was caused—the injury was caused by the lifting at work back on August 1, of 2012?

A: Yes, sir.

Q: Were you concerned as of the time you reviewed the MRI results with the doctor that the injury to your back could cause problems with you continuing to work?

A: Yes, sir.

Q: And were you concerned at the time that you reviewed the MRI results that your injury could be permanent, meaning can't be completely resolved through treatment, medical treatment?

A: Yeah, that's what the doctor told me is that sometimes the pain—the pain and back pain could be cured but never quit, so I understood that which—

Q: And if I am hearing you correctly, the doctor explained to you that it may get better, but you may still have symptoms in your back?

A: Yes, sir.

Q: And that was told to you at the time of your visit with the doctor to go over the MRI results in September 2012?

A: Yes, sir.

Q: And were you concerned then at that time that this would be a problem because your job at Marzetti required you to do some lifting?

A: Yes, sir.

Q: And the lifting may cause more strain on your back?

A: Yes, sir.

(Ex. 17, pp. 23-24)

Mr. Bajgai offered similar testimony at trial, confirming that he knew in September 2012 that his back pain may never go away. He acknowledged again at trial that he knew his injury was serious and work related in September 2012. (Tr. pp. 96-97) I perceive no specific reason to disbelieve claimant when he offered this testimony both at his deposition and at trial. His responses to these questions were not all cursory and not all the questions were leading. Yet, claimant conceded the factual accuracy of the above facts.

Therefore, I find that Mr. Bajgai knew he had sustained a work related back injury in August 2012. By September 2012, he had submitted to an MRI of his low back. He subjectively knew by September 2012 that his back injury was serious. He knew that it may be permanent by September 2012 and that it may affect his ability to continue working in his pre-injury job by September 2012. I find that both objectively and subjectively Mr. Bajgai knew by September 2012 that he had sustained a low back injury as a result of his work activities on August 1, 2012. I find that he knew or should have known by September 2012 that the back injury was serious, may be permanent, and that it may have an adverse impact on his employment.

Mr. Bajgai seeks payment of medical bills set forth in Exhibit 21 which total $3,591.21. These medical expenses were incurred for treatment of the August 19, 2014, temporary aggravation. Defendants Marzetti and Travelers stipulated that the disputed medical expenses were causally connected to their injury and that the expenses were authorized by those defendants. (Hearing Report)

With respect to the penalty claim, both parties' briefs state that the penalty benefits have already been paid by defendants Marzetti and Travelers. Travelers has not appealed the issue. I find that the penalty issue is moot.

CONCLUSIONS OF LAW

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The

expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001);

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

In this case, I found that Mr. Bajgai proved he sustained a permanent low back injury as a result of his work activities on August 1, 2012. I also found that he has proven a temporary aggravation of this low back condition as a result of repetitive activities performed at his work leading up to the August 19, 2014 injury date. Therefore, I conclude claimant has proven a traumatic injury to his low back on August 1, 2012, which resulted in permanent disability. I further conclude that claimant has proven a cumulative injury occurred on August 19, 2014, but that injury resulted only in a temporary aggravation.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant is entitled to temporary total disability benefits under Iowa Code section 85.33(1) for his absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to work substantially similar to the work he was performing at the time of injury; or, until his condition recovers to its pre-injury status, whichever occurs first.

In this case, claimant returned to work after the August 1, 2012 injury and first achieved MMI in September 2012, claimant returned to work and subsequently was re-injured in an aggravation injury on August 19, 2014 and achieved MMI a second time on April 3, 2015. Claimant testified and I found that his condition returned to its pre-August 19, 2014 status. Nevertheless, claimant is entitled to temporary total disability benefits for his time off work from August 19, 2014 through April 3, 2015. Having found that the time off during this period of time was caused by a temporary aggravation on August 19, 2014, I conclude that claimant is entitled to an award of temporary disability benefits against Marzetti and Travelers from August 19, 2014 through April 3, 2015. Iowa Code section 85.33(1). Defendants are entitled to credit against this award for the disability benefits under the group insurance plan, less the amount of taxes claimant had to pay for such benefits. King v. Marion Indep. Sch. Dist., File No. 5036224 (App. June 10, 2013).

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).

Defendants Marzetti and Travelers stipulated in the hearing report that the medical expenses itemized in Exhibit 21, in the amount of $3,591.21, were caused by the August 19, 2014 temporary aggravation injury. They also stipulated that they authorized the expenses contained in Exhibit 21. Those stipulations were accepted by the hearing deputy. I perceive no reason why those stipulations should be rejected. Therefore, I conclude that Marzetti and Travelers are responsible for satisfying these medical expenses. Iowa Code section 85.27.

Defendants assert that the claim for benefits for the 2012 work injury was filed too late and is barred by the statute of limitations in Iowa Code section 85.26. The two-year statute of limitations for original proceedings and the 90-day notice period does not begin to run, until the injured worker, acting as a reasonable person, knew or should have known that his physical condition was serious enough "to have a permanent adverse impact on the claimant's employment or employability." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). This rule is applicable to both traumatic and cumulative work injuries. Baker v. Bridgestone/Firestone, 872 N.W.2d 672 (Iowa 2015); Baker v. Bridgestone/Firestone, File Nos. 5040732 & 5040733 (Remand Dec, April 13, 2016).

In this case I found that by September 2012, claimant knew or should have known that the 2012 injury was work related and that it was serious enough to potentially have a permanent adverse impact on his employment. His petition was filed more than two years after September 2012. Therefore, I conclude that defendants proved their statute of limitations defense and that claimant failed to prove the discovery rule should apply and toll his statute of limitations. I conclude that the claim against Marzetti and Ace should be dismissed without award of benefits because claimant failed to file that claim within the applicable statute of limitations. Iowa Code section 85.26(1).

Claimant seeks reimbursement for the independent medical evaluation performed by Dr. Bansal. Section 85.39 permits an employee 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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Dr. Bansal's evaluation was subsequent to the evaluation by defendants' selected physician, Dr. Kuhnlein. Therefore, claimant is entitled to reimbursement of Dr. Bansal's initial independent medical evaluation fee from Marzetti and Travelers. Iowa Code section 85.39; DART v. Young, 867 N.W.2d 839 (Iowa 2015).

However, Dr. Bansal issued a supplemental report in which he was asked to review additional medical information and asked whether that changed his opinions. The presiding deputy commissioner awarded the charges for the supplemental report. I disagree with the presiding deputy commissioner's analysis and award of this supplemental report charge.

Section 85.39 requires an employer to pay for one independent medical evaluation. See Larson Manufacturing Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009). It is possible that a second report authored by the evaluating physician could be sought as a cost pursuant to 876 IAC 4.33. DART v. Young, 867 N.W.2d 839 (Iowa 2015). The supplemental report from Dr. Bansal was essentially introduced in lieu of the doctor's testimony. Id. at 846. However, the supplemental report is not part of the initial evaluation and is not reimbursable pursuant to Iowa Code section 85.39.

Claimant also raises a claim for penalty benefits under Iowa Code section 86.13(4). No weekly benefits are awarded against Marzetti and Ace in this decision. Therefore, no penalty benefits can be awarded against those defendants. The parties' briefs make it clear that Marzetti and Travelers have already paid the penalty benefits awarded in the arbitration decision. Travelers did not appeal the issue. Any claim for penalty benefits is now moot.

Claimant urges assessment of various potential costs in his appeal brief. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

No benefits are awarded against Marzetti and Ace in this decision. Costs should not be assessed against those defendants. Defendants Marzetti and Travelers did not challenge or appeal any of the assessments of costs in the arbitration decision. I conclude that the cost assessments made by the deputy commissioner were reasonable in the arbitration decision and not appealed by the defendants.

However, claimant now seeks assessment of Dr. Bansal's supplemental report. The undersigned did not accept Dr. Bansal's opinions as accurate or convincing. Benefits were not awarded based upon the opinions offered by Dr. Bansal. Utilizing the agency's discretion, I perceive no reason why the cost of Dr. Bansal's supplemental report should be assessed against defendants. Iowa Code section 86.40.

ORDER

THEREFORE IT IS ORDERED:

This appeal decision is issued as final agency action pursuant to the June 28, 2018, delegation of authority from the Iowa Workers' Compensation Commissioner and Iowa Code section 86.3.

The December 19, 2016 arbitration decision is modified.

In File No. 5056031:

Claimant shall take nothing.

Claimant shall bear the cost of appeal in this file.

In File No. 5051657:

Defendants Marzetti Frozen Pasta, Inc., and Travelers Indemnity Company shall pay to claimant healing period benefits from August 19, 2014 through April 3, 2015, at the stipulated rate of four hundred twenty-two and 44/100 dollars ($422.44) per week. Defendants shall have a credit against this award for the disability benefits paid in the amount of five thousand three hundred eighty-eight and 37/100 dollars ($5,388.37) less any income taxes paid or owed on these benefits.

Defendants Marzetti Frozen Pasta, Inc. and Travelers Indemnity Company shall pay to claimant the sum of $6,879.74 as a penalty for their unreasonable denial of weekly healing period benefits.

Defendants Marzetti Frozen Pasta, Inc., and Travelers Indemnity Company shall pay the medical expenses listed in the hearing report and contained at Exhibit 21, totaling three thousand five hundred ninety-one and 21/100 dollars ($3,591.21).

Defendants, Marzetti Frozen Pasta, Inc. and Travelers Indemnity Company shall reimburse claimant for any out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

Defendants Marzetti Frozen Pasta, Inc. and Travelers Indemnity Company shall reimburse claimant the total cost of the independent medical evaluation performed by Dr. Bansal in the amount of one thousand four hundred ninety-five and 00/100 dollars ($1,495.00).

Defendants Marzetti Frozen Pasta, Inc. and Travelers Indemnity Company shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Claimant shall bear the cost of appeal in this file.

Signed and filed this 20th day of August, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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