

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHEN ALM,	:	
	:	
Claimant,	:	File No. 5067128
	:	
vs.	:	ARBITRATION DECISION
	:	
ARCHER DANIELS MIDLAND COMPANY, INC.,	:	
	:	
Employer,	:	
Self-Insured,	:	Head Notes: 1108.50, 1402.20, 1402.40
Defendant.	:	1402.60, 1802, 1803, 2401, 2907

STATEMENT OF THE CASE

Stephen Alm, claimant, filed a petition in arbitration seeking workers' compensation benefits from Archer Daniels Midland Company, Inc., self-insured employer as defendant. Hearing was held on February 6, 2020 in Des Moines, Iowa.

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.

Stephen Alm and Arlen Steines were the only witnesses to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE7, Claimant's Exhibits 1-4, and Defendant's Exhibits A-E. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on March 16, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on September 1, 2017.

2. Whether claimant's claim is barred by operation of Iowa Code section 85.23, for failure to provide timely notice of the injury.
3. Whether claimant sustained permanent disability as the result of the September 1, 2017 work injury. If so, the extent of permanent disability claimant sustained.
4. Whether claimant is entitled to healing period benefits from October 28, 2018 through February 1, 2019.
5. Whether defendant is responsible for payment of past medical expenses.
6. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the independent medical examination (IME).
7. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Stephen Alm, is 46 years old. He is alleging a cumulative low back injury, with an alleged injury date of September 1, 2017. Mr. Alm has a high school diploma. He began working for Archer Daniels Midland Company, Inc. ("ADM") in 1994. Initially, he worked as a construction laborer. Mr. Alm later transferred to a processing assignment in the oil house. He has also worked in the boiler house and as a coal handler. In 1996, Mr. Alm began working in the sugar house and was still working there at the time of the hearing. In the sugar house he started as a dryer operator. The dryer operator's job is to ensure that the crystal and dextrose is dry enough to be transferred into a blower and packing hopper. On occasion, he would need to lift 50 pounds. This job also involved frequent walking and climbing stairs. Mr. Alm worked in three different buildings, ranging between 6 and 9 stories high. He would move between buildings daily. In 2015, Mr. Alm joined the management group. He was still part of the management group at the time of the hearing. Mr. Alm manages 18 employees; 9 are in the sugar house and 9 are in the refinery. (Transcript pages 9-15)

Mr. Alm first injured his low back on April 6, 1998 when he fell 8 feet off of a ladder. He experienced severe mid and lower back pain. He developed pain in his left buttock and leg. Mr. Alm was diagnosed with degenerative disc disease, more prominent on the right in June of 1998. (JE1, 2, 3)

Mr. Alm sustained an acute work-related injury to his low back in 2000. He was working in the sugar house when he slipped, but did not fall. At that time, he felt a pull in his lower back. He reported his symptoms to ADM. Mr. Alm underwent an MRI which revealed a bulging disc in his lower L5-S1. He experienced right leg pain and

numbness from his right leg into his right foot. In July of 2000, Mr. Alm had a right L5-S1 discectomy. Following the surgery, he initially felt great. Richard Roski, M.D., assigned 10 percent whole person impairment due to occasional pain in his right leg. On June 19, 2001, Mr. Alm was paid 50 weeks of permanent partial disability benefits by ADM. (JE1, p. 3; JE3, p. 36; Ex. A, p. 1)

After the 2000 surgery, Mr. Alm continued to experience right leg numbness when he was active. The numbness would subside with rest and reoccur when he was more active. According to Mr. Alm, the numbness would not last more than a day. He was not too concerned about the numbness, because it would come and go. His symptoms got progressively worse over the years. (Tr. pp. 18-19; 31-35)

Mr. Alm testified that he continued to have low back and right leg issues between 2000 and 2017, but never sought treatment. However, there is a record that demonstrates he did seek treatment on June 17, 2008 for abrupt right lumbar pain. He was treated conservatively. (Tr. p. 19; JE4, pp. 41-42)

In September of 2017, Mr. Alm's symptoms became worse. His pain would still come and go, but overall his symptoms were worse. He also had a new symptom. He was sitting at one of his kid's football games when he first noticed that his testicles were going numb. His right leg and buttock symptoms progressively got worse, to the point that rest alone was no longer helping. (Tr. pp. 31-35)

In March of 2018, Mr. Alm went to J. Dixon, M.D. for a routine physical. He mentioned his low back pain to Dr. Dixon. They decided to wait and see if things would improve, as they had in the past. (Claimant's Exhibit 1, p. 3) Mr. Alm's symptoms continued to worsen. He saw Dr. Dixon again on June 20, 2018. He reported that his pain was worse with standing for longer than 5 minutes or walking farther than 50 feet. (JE1, p. 18; JE5, p. 44) Dr. Dixon scheduled an MRI which was performed on July 18, 2018. The MRI revealed multilevel lumbar degenerative changes with a small focal right paracentral disc extrusion contacting thickened right S1 nerve root. (JE1, pp. 15-17)

In July of 2018, after receiving the MRI results Mr. Alm reported his injury to ADM because he felt that his symptoms might relate back to his 2000 work injury. Before he reported the injury he had not missed any time from work due to his symptoms or injury. (Tr. pp. 37-41)

On August 7, 2018, Mr. Alm saw Michael Prescher, M.D. Mr. Alm presented with right lower back pain that radiated into his buttock and travelled down the back of his right thigh into his heel. He also reported that his right groin and testicle went numb with prolonged sitting. He noted that he had a prior discectomy and had been doing fine until about 6 months ago when the pain started returning. The assessment was chronic low back pain with right lower extremity pain. Mr. Alm did have obvious disc protrusion

at L5-S1 on the right side complicated by his obesity. He was scheduled for a lumbar epidural steroid injection. (JE1, p. 18)

In September of 2018, Mr. Alm saw Todd Ridenour, M.D. He reported that he had intermittent right lower extremity numbness with activity since his surgery. Approximately 5-6 months ago, he began to develop intermittent low back pain that radiated into his right buttock, groin, testicles, lateral thigh, and pain in his right buttock, posterior thigh, calf into heel. He also reported intermittent paresthesias of right buttock, groin, and lateral thigh. Standing or walking exacerbated his symptoms. He also noticed weakness in his right lower extremity which made him feel clumsy. (JE5, pp. 44-45)

Mr. Alm underwent a few injections which provided short-term relief, but then his pain returned. (JE1, pp. 20-22) His symptoms included lower back pain and right leg pain with numbness. He was eventually scheduled for a second L5-S1 discectomy; this took place on October 22, 2018. Dr. Ridenour noted dense scar tissue and fibrosis at the L5-S1 level with a great deal of fibrotic scar tissue in the canal. (JE5, pp. 48-50) Mr. Alm continued to experience pain in his right leg and buttock. His numbness was less than it was prior to the surgery. After surgery, Mr. Alm was off work until February of 2019. (Tr. p. 22)

At the request of the defendant, Mr. Alm saw David Boarini, M.D. at the Iowa Clinic on June 12, 2019. Dr. Boarini noted that Mr. Alm worked full time but in a non-physical job. Dr. Boarini stated, "patient had no specific trauma and this is simply a matter of aging and degenerative change. The majority of disk herniations have nothing to do with trauma and simply have to do with aging changes. The primary cause besides aging is the patient's obesity." Dr. Boarini stated, "I think 10% permanent partial impairment from the original surgery covers the current situation and would not change that." It is not clear what, if any, method Dr. Boarini utilized from the AMA Guides. (Defendant's Ex. D, p. 16)

At the request of his attorney, Mr. Alm saw John Kuhnlein, D.O. on December 18, 2019. Dr. Kuhnlein was familiar with Mr. Alm's job history and duties at ADM. He also reviewed claimant's medical history. Mr. Alm described intermittent activity-dependent right-sided low back pain which radiated into his right buttock and down his posterior thigh though his calf to his right ankle. Dr. Kuhnlein examined Mr. Alm and performed testing such as range of motion and sensitivity tests. Dr. Kuhnlein listed Mr. Alm's diagnoses as: right L5-S1 disc herniation with July 6, 2000, right L5-S1 discectomy; recurrent right L5-S1 disc herniation and scar tissue from the first surgery with October 22, 2018, right L5-S1 re-exploration and open microdiscectomy with scar removal, and residual right L5-S1 sensory deficit. Dr. Kuhnlein opined that "the work for ADM may not have been the only factor in the development of the recurrent disc herniation but it was a substantially more than minor factor in the development of the recurrent disc herniation Mr. Alm experienced." (Cl. Ex. 1, p. 8) Dr. Kuhnlein placed Mr. Alm at maximum medical improvement (MMI) as of April 22, 2019, six months after

his surgery. He utilized the Fifth Edition of the AMA Guides and assigned a total of 23 percent whole person impairment. Dr. Kuhnlein set forth the basis for his rating. Dr. Kuhnlein did not assign any material handling restrictions. He did restrict Mr. Alm to sitting, standing, or walking on an occasional basis with the ability to change positions for comfort. He stated Mr. Alm could occasionally bend at the waist. (Cl. Ex. 1)

The first issue that must be addressed is whether Mr. Alm sustained a work injury on September 1, 2017. I find the opinions of Dr. Kuhnlein to be more persuasive than those of Dr. Boarini. Dr. Kuhnlein's report demonstrates his understanding of Mr. Alm's job duties and physical requirements. Additionally, Dr. Kuhnlein set forth his understanding of Mr. Alm's medical history. Dr. Kuhnlein's also provided his rationale for his opinions. Dr. Boarini merely noted that Mr. Alm sustained no specific trauma and that his condition was simply a matter of aging and degenerative change, but he failed to directly address the issue of cumulative trauma. Additionally, Dr. Boarini does not demonstrate a clear understanding of Mr. Alm's job duties. I find Dr. Kuhnlein's report to be thorough, well-reasoned, and more persuasive than that of Dr. Boarini's. I find Mr. Alm's low back and right lower extremity conditions are causally related to his work duties at ADM on September 1, 2017. With regard to permanent functional impairment and restrictions, I find the opinions of Dr. Kuhnlein to carry greater weight than those of Dr. Boarini. Dr. Kuhnlein set forth the basis for his impairment rating. Dr. Boarini did not provide an explanation for the rating he assigned, it is not even clear if he utilized the AMA Guides. I find Mr. Alm sustained 23 percent permanent functional impairment to his whole person as the result of the September 1, 2017 work injury.

Defendant contends Mr. Alm failed to give timely notice of his injury. I find that Mr. Alm likely knew or should have known, by June 20, 2018, that he sustained an injury to his low back that also affected his right lower extremity and that his injury was work related. June 20, 2018 is the date when he first sought treatment for his increased symptoms. (Cl. Ex. 1, p. 3) Although Mr. Alm knew in the autumn of 2017 that he was having increased symptoms and he thought these were caused by work, I find Mr. Alm did not yet know the serious nature of his injury. Mr. Alm's symptoms progressively got worse. It was not until July of 2018, when he was told the results of his MRI that he could have known the serious nature of his injury. Up until that time, he had not missed time from work, nor had he received significant medical care for his condition. It was in July of 2018, claimant was aware or should have known, of the serious nature of his injury.

Mr. Alm reported his injury to the defendant in July of 2018. Defendant contends that Mr. Alm failed to give timely notice of his injury to his employer. However, I find Mr. Alm was not aware or should not have known about the serious nature of his injury until he was told the results of his MRI in July of 2018. Thus, I find defendant did not prove by a preponderance of the evidence that Mr. Alm failed to give notice of his work-related injury within 90 days of him knowing or objectively learning that his injury was likely work-related and that it was a serious condition.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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); Dunlavy 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).

The September 1, 2017 date of injury falls under the 2017 statutory changes. Included in those changes is Iowa Code section 85.34(2)(x) which states:

In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2018).

Based on the above findings of fact, I conclude Mr. Alm sustained an injury that arose out of and in the course of his employment with ADM on September 1, 2017.

Mr. Alm has returned to work with the defendant employer. There are two permanent partial disability ratings in the case. However, only Dr. Kuhnlein sets forth his methodology under The Guides. Based on Dr. Boarini's report, it is not known if he utilized The Guides. Therefore, based on the Iowa Code which mandates that a functional loss shall be determined solely by utilizing the Guides to the Evaluation of Permanent Impairment, published by the AMA, the claimant's permanent partial disability is 23 percent whole person impairment. 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. Thus, claimant has demonstrated entitlement to 115 weeks of permanent partial disability benefits at the stipulated rate of eight hundred fifty-eight and 72/100 dollars (\$858.72). The parties agree that the defendant is entitled to apportionment under Iowa Code section 85.34(7) for the 10 percent whole body impairment paid by ADM as the result of Mr. Alm's 2000 work injury. Thus, claimant has shown entitlement to an additional 13 percent body as a whole impairment rating. Claimant has demonstrated entitlement to payment of 65 weeks of permanent partial disability benefits at the stipulated rate.

Defendant has raised notice as an affirmative defense. 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).

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).

Based on the above findings of fact, I conclude that defendant has failed to carry its burden of proof to demonstrate that Mr. Alm failed to give timely notice of his injury. I found Mr. Alm was not aware or should not have known about the serious nature of his injury until he was told the results of his MRI in July of 2018. Mr. Alm reported his injury to the defendant in July of 2018. Thus, I conclude defendant did not prove by a preponderance of the evidence that Mr. Alm failed to give notice of his work-related injury within 90 days of him knowing or objectively learning that his injury was likely work-related and that it was a serious condition.

Mr. Alm is seeking healing period benefits from October 28, 2018 through February 1, 2019. 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).

Defendant does not dispute that Mr. Alm was off of work during this period of time. During this time period claimant was off work recovering from his surgery. I conclude claimant has demonstrated that he is entitled to payment of healing period benefits from October 28, 2018 through February 1, 2019, at the stipulated rate.

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.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME he underwent with Dr. Kuhnlein on December 18, 2019. Six months earlier Dr. Boarini issued his report regarding Mr. Alm. Defendant argues claimant is not entitled to reimbursement because Dr. Boarini only saw Mr. Alm for purposes of a causation opinion. However, he also rendered his opinion on permanent impairment. Thus, I conclude that the prerequisites of Iowa Code section 85.39 were met and thus

defendant is responsible for reimbursement of claimant's IME. Defendant shall reimburse claimant in the amount of \$3,360.50 for the IME.

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).

Claimant is seeking payment of past medical expenses as set forth in Claimant's Exhibit 3. A review of these bills demonstrates that these expenses were incurred as the result of claimant's work injury. Defendant does not make any argument as to why the employer should not be responsible for these expenses if the injury is found to be compensable. I find defendant employer is responsible for the claimant's medical expenses as set forth in Claimant's Exhibit 3.

Finally, claimant is seeking an assessment of costs as set forth in Claimant's Exhibit 4. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. I find that claimant was generally successful in his claim and that an assessment of costs is appropriate in this case. Claimant is seeking costs in the amount of \$100.00 for the filing fee. I find this is an appropriate cost under 4.33(7). Claimant is also seeking the IME expense as a cost. However, I concluded that claimant was entitled to reimbursement for the IME under Iowa Code section 85.39. Thus, defendant is assessed costs in the amount of one hundred and no/100 dollars (\$100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of eight hundred fifty-eight and 72/100 dollars (\$858.72).

Defendant shall pay sixty-five (65) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 25, 2019.

Defendant shall pay healing period benefits from October 28, 2018 through February 1, 2019.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant is responsible for the past medical expenses as set forth in Claimant's Exhibit 3.

Defendant shall reimburse claimant in the amount of three thousand three hundred sixty and 50/100 dollars (\$3,360.50) for the IME.

Defendant shall reimburse claimant costs as set forth above.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of June, 2020.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Dustin Mueller (via WCES)

Paul Powers (via WCES)

Mark Woollums (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.