BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARTY BUSSANMAS,

Claimant,

vs.

PERFORMANCE FOOD GROUP,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5062198

ARBITRATION

DECISION

Head Note Nos.: 1108.50; 1402.40; 1403.30; 1802; 1803; 2401; 2907

STATEMENT OF THE CASE

Marty Bussanmas, claimant, filed a petition in arbitration seeking workers' compensation benefits from Performance Food Group, employer and Indemnity Insurance Company of North America, insurance carrier, as defendants. Hearing was held on August 22, 2017 in Des Moines, Iowa.

Claimant, Marty Bussanmas, and Todd Smith both testified live at trial. The evidentiary record also includes joint exhibits JE1-JE5, claimant's exhibits 1-3, defendant's exhibits A-F.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on August 29, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on April 22, 2015, which arose out of and in the course of his employment?
2. Whether claimant's claim is barred by operation of Iowa Code section 85.23 for lack of timely notice?
3. The extent of industrial disability, if any, claimant sustained as a result of the April 22, 2015 work injury.
4. Whether the claimant is entitled to temporary disability benefits?
5. Whether claimant is entitled to past medical benefits?
6. Assessment of costs.

FINDINGS OF FACT

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

Claimant is alleging an April 22, 2015 cumulative injury to his low back. Defendants dispute that he sustained an injury arising out of and in the course of his employment on April 22, 2015, and further assert that even if he did sustain such an injury, he failed to provide timely notice of the injury. I find that Mr. Bussanmas did sustain an injury which arose out of and in the course of his employment with the defendant employer. I further find that the claimant gave timely notice of his injury to his employer.

Mr. Bussanmas worked as a delivery driver for Performance Food Group since 2010. He estimated that he worked approximately 15 hours per day. He delivered supplies and products to restaurants. His truck is preloaded for him, but he unloads all the supplies and products at each stop. His job involved unloading product from the trailer with a two-wheel cart, and moving the product to the area designated by the customer, and lifting the product off the cart to the designated area. He used a ramp to remove the product from the truck. He estimated that he lifted between 15,000 to 19,000 pounds per day, using a dolly. (Testimony; Ex. 1, p. 6)

The defendants dispute that Mr. Bussanmas sustained an injury arising out of and in the course of his employment with the defendants. Mr. Bussanmas described his work duties at hearing; his description was not disputed by the defendants. I find that his description at the hearing is generally consistent with what is described in the report of Sunil Bansal, M.D. At the request of his own attorney, Mr. Bussanmas saw Dr. Bansal for an IME on April 21, 2017. Dr. Bansal causally connected Mr. Bussanmas's low back injury to his work for the defendant employer. Dr. Bansal opined that Mr. Bussanmas sustained an injury to his back as a result of the repetitive and physically demanding work activities; his work aggravated his lumbar degenerative disc disease. The doctor further opined that as a result of the work injury, Mr. Bussanmas sustained 5 percent whole person impairment. Dr. Bansal felt that Mr. Bussanmas would benefit from restrictions. However, Mr. Bussanmas did not want to jeopardize his employment. The doctor noted that Mr. Bussanmas had returned to work and was able to perform his job; therefore, the doctor did not feel permanent restrictions were necessary. (Cl. Ex. 1)

Dr. Bansal's opinion is unrebutted. I accept the opinions of Dr. Bansal. I find that Mr. Bussanmas sustained an injury that arose out of and in the course of his employment on April 22, 2015.

We now turn to the issue of whether claimant provided timely notice of the injury to the defendants. Mr. Bussanmas gave his employer actual notice of his injury on April 20, 2015. (Ex. D, p. 17) Prior to this time, he sought treatment with his family physician, Dennis Zachary, M.D., which he submitted to his health insurance. Mr. Bussanmas began treating for his back with Dr. Zachary on November 6, 2014; an MRI was ordered at that time. (JE1, pp. 1-6) The MRI demonstrated narrowing at L4-L5, disc bulging, and some degeneration. (JE1, pp. 7-8) In an attempt to reduce his pain, Mr. Bussanmas underwent a series of lumbar epidural steroid injections. These were performed on December 5, 2014, January 9, 2015, and April 3, 2015. (JE2)

At hearing, Mr. Bussanmas testified that Dr. Zachary and the doctor who administered the injections, both told him that the injections would relieve his pain. Mr. Bussanmas did receive some pain relief from each injection, but then the pain returned. When the third injection was administered in April of 2015, Mr. Bussanmas was informed that if the pain returned he would be referred to an orthopedic surgeon for a more permanent solution. (Ex. D, p. 17)

Mr. Bussanmas testified that it was not until the third injection wore off and his pain returned that he realized his injury was serious enough to have a permanent adverse impact on his employment or employability. His testimony is supported by a hand-written note he gave to the defendant employer on April 20, 2015. I find that Mr. Bussanmas did not realize the permanent adverse impact his injury had on his employment or employability until after the benefits of the third injection wore off and the doctor told him he would need to see an orthpaedic surgeon. (Ex. D, p. 17) Thus, I find that the claimant's repetitive injury manifested on April 20, 2015. I further find that Mr. Bussanmas gave notice of his injury to his employer on that same date. Therefore, I find that defendants have failed to carry their burden of proof to show by a preponderance of the evidence that claimant failed to provide timely notice of his injury to the defendants.

We now turn to the issue of disability, if any, Mr. Bussanmas sustained as a result of the work injury. I find that claimant has demonstrated that he is motivated to continue working. Even after his claim was denied as compensable Mr. Bussanmas sought treatment on his own in an attempt to improve his condition. He sought treatment with David E. Hatfield, M.D., at Des Moines Orthopaedic Surgeons (DMOS). When Dr. Hatfield saw claimant in June of 2015, he recommended that he lose significant weight before he could consider surgery. To his credit, Mr. Bussanmas lost almost 80 pounds, but his pain did not improve. He continued to work. (JE 3, pp. 84-85)

Mr. Bussanmas also treated with a pain doctor, Christian P. Ledet M.D. He provided injections, but the injections failed to give Mr. Bussanmas any long term relief. Thus, the next step was to try a spinal cord stimulator implant. (JE5; Testimony)

The spinal cord stimulator implant provided some relief, especially for his leg symptoms. Mr. Bussanmas testified that the stimulator helped to take some of the edge off of his pain. However, as he continued to work his pain and stiffness continued to plague him. At hearing, Mr. Bussanmas testified that after work he really is not able to do much at home. Mr. Bussanmas testified that he is not getting along very well. He still has difficulty sleeping. He feels wiped out by the end of his work day. He takes approximately ten pain pills per day. He used to be able to wait until 9:00 a.m., to turn his stimulator on, but now he needs to turn it on around 7:00 a.m. He has had to use sick time for doctor's appointments. He used to see Dr. Ledet monthly for refills of his medications, but now he only goes once every three months because if he misses more time from work he could be disciplined. Mr. Bussanmas continues to work for the defendant employer full-time. He feels his determination is what has allowed him to be able to continue to work; he needs to keep his insurance coverage. He no longer has any hobbies because he simply is too exhausted. (Testimony)

Mr. Todd Smith testified on behalf of the defendants. He testified that claimant is on track this year to earn as much or more money than he did at the time of the injury. (Testimony)

At the time of hearing, Mr. Bussanmas was 61 years of age. He is a high school graduate. Following high school, he attended less than one semester of college; due to financial reasons had to leave college to enter the workforce. In the mid-1970's, Mr. Bussanmas worked cutting pipes in a warehouse. From approximately 1975-2009, he worked for a food company as a local delivery driver. Then, for the next approximately six months he worked delivering wine. Since 2010 he has worked for the defendant employer. (Testimony; Cl. Ex. 2, p. 12)

When all the evidence is considered, I find that Mr. Bussanmas has suffered an industrial disability as a result of his cumulative, repetitive injury with the defendant employer. Dr. Bansal's opinions are unrebutted. He assigned 5 percent permanent functional impairment. Although Dr. Bansal felt Mr. Bussanmas could benefit from restrictions he did not assign any restrictions. Thus, I find that claimant currently has no formal restrictions placed on his activities. I further find that Mr. Bussanmas continues to work his full-time position with the defendant employer; there is no evidence that he is being accommodated in that position.

With regard to the claim for industrial disability, claimant's counsel cites to a pertinent recent Commissioner's decision which states:

> A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has opined that the worker has permanent

> impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, e.g. the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work. . . . Baker v. Bridgestone/Firestone, 2016 WL 1554240 (Iowa Workers' Comp. Comm'n 2016) (remand decision).

(Claimant's Brief, p. 8)

Mr. Bussanmas is clearly motivated and determined to continue working. He testified that in order to keep working he has to turn his stimulator on earlier in the day than he used to; he also takes numerous medications every day. Considering his age, educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 25 percent loss of future earning capacity as a result of his work injury with the defendant employer.

We now turn to the issue of healing period (HP) benefits. Claimant is seeking HP benefits from April 19, 2016 through June 16, 2016. The parties have stipulated that if the defendants are liable for the alleged injury, claimant is entitled to benefits for this period of time. (Hearing Report) Thus, because defendants are liable for the alleged injury, defendants shall pay claimant HP benefits from April 19, 2016 through June 16, 2016 at the stipulated rate of $767.08 per week.

Claimant is also seeking payment of past medical expenses under Iowa Code section 85.27. At the time of the hearing the defendants agreed that if the injury was found to be compensable and if it was determined that claimant gave timely notice of the injury, then defendants would be liable for the past medical expenses submitted by the claimant. Thus, defendants are responsible for the medical expenses listed in claimant's exhibit 3.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. I find that the claimant was generally successful in his claim and therefore find that an assessment of costs is appropriate. Claimant is seeking reimbursement of the $100.00 filing fee and the $12.93 cost of the service of the original notice and petition; I find these are allowable costs.

Claimant is also seeking reimbursement for the expense of Dr. Bansal in the amount of $1,982.00. Claimant is seeking this cost under 876 IAC 4.33(6) which allows

the reasonable cost of doctor and practitioner reports. The total of Dr. Bansal's invoice is $2,485.00 of which $1,982.00 is for the record review and report; the remainder was for a physical examination. I find that Dr. Bansal's invoice does not break down the cost for the preparation of the report. Thus, there is no way for the undersigned to know what expense is actually attributable to the report. I exercise my discretion and do not assess Dr. Bansal's record review and report as a cost.

Therefore, defendants are assessed costs in the amount of one-hundred twelve and 93/100 dollars ($112.93).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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

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

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

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

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination.

The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Based on the above findings of fact, I concluded that Mr. Bussanmas sustained an injury that arose out of and in the course of his employment on April 22, 2015.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

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).

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).

As noted above, I concluded that Mr. Bussanmas did not realize the permanent adverse impact his injury had on his employability until after the benefits of his third injection wore off and the doctor informed him he would need to see an orthopedic surgeon. I concluded that his repetitive injury manifested on April 20, 2015. I further concluded that claimant gave notice of his injury to his employer on that same date. Thus, I concluded that claimant provided timely notice of his injury and that the defendants' notice defense failed.

Because 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.

Based on the above findings of fact, I concluded that Mr. Bussanmas has sustained 25 percent industrial disability as a result of his work injury. As such, he is entitled to 125 weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 17, 2016.

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). Defendants shall pay claimant healing period benefits from April 19, 2016 through June 16, 2016.

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 are responsible for the medical expenses listed in claimant's exhibit three.

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner. I concluded that defendants shall be taxed for the costs of the filing of the petition and for the costs of service of the original notice and petition. Defendants are taxed in the amount of one-hundred twelve and 93/100 dollars ($112.93).

Claimant was also seeking an assessment of costs for the expense of Dr. Bansal. The Iowa Supreme Court provided guidance on whether the full cost of an IME

may be taxed as a cost pursuant to rule 876 IAC 4.33 if that IME does not qualify for reimbursement under Iowa Code section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015). In Young, the Court clarified that rule 876 IAC 4.33 allows only for the taxation of costs "incurred in the hearing." A physician's report becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. However, the Court has indicated that the report is separate from the examination. The Court indicated that if an injured worker sought reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. (Id., pp. 846-847) Because the invoice of Dr. Bansal does not separate the cost of preparing the report the undersigned exercises my discretion and does not assess any of Dr. Bansal's expenses as a cost.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of seven hundred sixty-seven and 08/100 dollars ($767.08).

Defendants shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 17, 2016.

Defendants shall pay healing period benefits from April 19, 2016 through June 16, 2016.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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

Defendants shall be responsible for the medical expenses listed in claimant's exhibit three.

Defendants shall reimburse claimant's costs in the amount of one-hundred twelve and 93/100 dollars ($112.93).

Defendants 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 9th day of January, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.