BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LARRY ROGERS, Claimant, vs. TPI COMPOSITES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 19002349.01 ARBITRATION DECISION Head Note Nos.: 1801, 1803, 2401, 2800, 1802, 2500, 2502, 2907, 2700, 3200

STATEMENT OF THE CASE

Claimant, Larry Rogers, has filed a petition for arbitration seeking workers' compensation benefits against TPI Composites, Inc., employer, and New Hampshire Insurance Company, insurer carrier, and the Second Injury Fund of Iowa, as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on January 25, 2021, via Court Call. The case was considered fully submitted on March 8, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6, Claimant's Exhibits 1-8, Defendants' Exhibits A-G, Fund Exhibits AA-BB, and the testimony of claimant.

ISSUES

1. Entitlement to temporary benefits from August 6, 2019, to October 15, 2019, and then again on January 29, 2020, through July 29, 2020;

2. Nature and extent of permanent disability;

3. Commencement date of PPD benefits, if any are awarded;

4. Lack of timely notice under Iowa Code Section 85.23;

5. Reimbursement of medical expenses itemized in Exhibit 6;

6. Reimbursement of IME under Iowa Code Section 85.39;

7. Right of alternate care;

8. Credit of $6,242.23;

9. Entitlement to benefits from the Second Injury Fund of Iowa with a first qualifying loss to the upper right extremity on August 11, 2018; and a second qualifying loss to the right lower extremity on August 6, 2019;

10. Penalty.

STIPULATIONS

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

The parties stipulate claimant sustained an injury arising out of and in the course of his employment on August 6, 2019. They further agree that claimant's average weekly wage as of August 6, 2019, was $838.65 per week. He was single and entitled to three exemptions. Based on the foregoing, claimant's weekly benefit rate is $546.66.

While they dispute entitlement to further temporary benefits, the parties will agree that claimant was off work from August 6, 2019, through October 15, 2019, and January 29, 2020, through July 29, 2020. This is the agreement made by the parties during the hearing. (See Transcript pp. 8-9)

The parties dispute entitlement to medical benefit reimbursement, but will stipulate that the fees and prices charged by the providers were fair and reasonable, the treatment was reasonable and necessary, the medical providers would testify to the reasonableness of their fees and treatments set forth in the list of expenses in Exhibit 6 and defendants will not offer contrary evidence.

FINDINGS OF FACT

Claimant was a 33-year-old person at the time of the hearing. At all times material hereto, he was single with one dependent child. His educational history includes graduation from high school along with training and certification of crane operation and JLG. JLG certified means he is authorized to operate machinery with occupied lift baskets. The certification required passing a written and driving test. His grades were slightly above average.

His work history includes building windows, building windmill blades, working as a cook, and sandblasting and painting. (CE 4:8-9) He testified that sandblasting was the hardest work he performed in his past. Claimant was terminated from Packaging Corporation of America approximately August 23, 2020, and has not returned to work since. (CE 4:9, DE G:3)

His past medical history includes a shoulder injury approximately seven years prior which was treated with a cortisone injection. (DE B:7) He reinjured the same shoulder in approximately 2014 or 2015 and was treated with pain medication and a sling. He also suffered an injury to his back with corresponding hip pain. On November 11, 2017, claimant took himself to the UnityPoint Clinic where he was seen in the emergency room by Pascuala Reyes, D.O. (JE 1:1) He complained of significant pain after "jumping off a roof about four days ago." Id. X-rays of the hip, spine and tibia/fibula were unremarkable for fracture or traumatic injury. (JE 1:5-7) He was released but had continued pain. (JE 1:8) Due to insurance issues, he returned to the ER on November 14 and November 24, 2017. (JE 1:9, JE 1:12) He was advised to follow-up with a primary care physician as emergency rooms are not equipped to treat chronic pain. (JE 1:14) On November 29, 2017, claimant followed up with Sarah Schaff, ARNP, for his pain in the left buttock radiating to the left leg. (JE 2:2) On July 5, 2018, he underwent a lumbar spine MRI which showed a large central dorsal disc protrusion and lipping of the endplates. There were active endplate degenerative findings at L4-S1. (JE 1:19) Dr. Delbridge suggested a possible epidural. (JE 1:26) Claimant opted against the shot and claimant testified that he was able to recover from the pain with exercises.

On August 11, 2018, he presented to the emergency room for evaluation of the right hand injury suffered at the Iowa State Fair when he got angry and punched a machine. (JE 1:20) X-rays showed a comminuted intra-articular fracture at the base of the right 4th and 5th metacarpal bones. (JE 1:24) During this visit, claimant's low back pain was mentioned as an ongoing issue. (JE 1:26) Arnold Delbridge, M.D., reviewed the July 2018 MRI as claimant was requesting an epidural. (JE 1:26) On examination, he had some pulling in his leg with the straight leg raise test and the dorsal flexors of his toes were weaker on the left. (JE 1:26) Dr. Delbridge scheduled claimant for surgical repair of the hand and tabled the back issue. (JE 1:26-27) Open reduction and internal fixation was conducted on August 13, 2018, with an extensor tendon repair on September 12, 2018, and the hardware was removed on October 4, 2018. (JE 1:28-29, 37-38, 31-32)

John Kuhnlein, D.O., conducted an IME on September 8, 2020, and noted claimant had normal wrist and normal digital motor strength in his right hand with normal reflexes bilaterally. (CE 1:15) Claimant was anesthetic to pinprick and light touch sensation in the right small finger's ulnar aspect. (CE 1:15) Dr. Kuhnlein assessed a 10% right upper extremity impairment based on reduced range of motion on the right as compared to the left and digital impairment of the right small finger. (CE 1:19) Dr. Kuhnlein recommended restrictions for the right hand that included occasional work at or above shoulder height, occasional grip or grasp with the right, occasional use of hand and power tools with the right but no limitations on the left hand. (CE 1:19-20)

Claimant underwent an IME with Peter G. Matos, D.O., on November 20, 2020. (DE A:3) Dr. Matos's IME report noted normal range of motion in both wrists, 5/5 grip strength, intact sensation and distal pulses, and negative Phalen's, Finkelstein's, Tinel's, and cubital tunnel tests. (DE A:4)

On August 6, 2019, claimant was working at TPI moving a root stand which he estimated weighed approximately 250 kg. His right foot got caught under the root stand. He felt immediate pain and removed his shoe to find that he was bleeding. He called his supervisor over to help him. An accident report was filed, and claimant was provided access with Care OnSite Services. (JE 3:1) A follow-up telemedicine visit was scheduled for August 7, 2019. (JE 3:1) He was returned to work full duty and instructed to avoid aggravation at work and home. Id. Claimant continued to have pain and requested an x-ray. (JE 3:3) An x-ray on August 14, 2019, revealed no fracture. (JE 4:1)

On August 20, 2019, claimant sought out care from his primary care doctor, George Gura, D.O. (JE 2:17) He reported pain in the right foot while walking and bending his toes. Dr. Gura referred claimant to podiatrist Kevin Mulvey, D.P.M., whom claimant saw on August 20, 2019. (JE 5:1) Claimant's musculoskeletal examination included back pain, difficulty walking, and foot pain. (JE 5:1) Dr. Mulvey took x-rays which suggested a nondisplaced cuneiform and suggested additional tests. (JE 5:2) Claimant was given an orthotic or CAM boot as well. Id. Dr. Mulvey took claimant off work for at least three weeks beginning on August 21, 2019. (JE 5:4) When claimant informed defendant employer of his work restrictions, he was told they would not be accommodated because he sought treatment on his own.

On August 27, 2019, an MRI of the right foot was conducted which showed nonspecific edema involving the lateral cuneiform distally which could be indicative of a bone contusion. (JE 1:35)

Claimant was released to return to work on September 10, 2019, based on a record review conducted by Christopher M. Tang, M.D., in Long Beach, California, but no physical visit was authorized. (JE 3:6) On September 10, 2019, Dr. Mulvey also returned claimant to work on the following Sunday, September 15, 2019, but on September 18, 2019, an addendum to the medical record was added to note that claimant was not able to return to work due to continued pain. (JE 5:10, 9)
Dr. Mulvey kept claimant off work for an additional three weeks. (JE 5:9, 11)

On October 10, 2019, Dr. Delbridge returned claimant to work full duty with no restrictions. (JE 1:39)

When claimant returned on October 15, 2019, he reported his right foot pain was gone "aside from an occasional dull ache up the anterior leg." (JE 5:13) Dr. Mulvey took additional x-rays, which found no fractures or other bony anomalies, gave Rogers stretching and range of motion exercises, and instructed him to follow up as needed. (Id.)

Dr. Mulvey responded to a form request letter confirming that claimant's treatment between August 2019 and October 15, 2019, was consistent with a heavy object falling on his foot. (CE 5:16) He agreed claimant could return to work as of October 15, 2019 without restrictions and the claimant had reached maximum medical improvement for the right foot injury as of that date. (CE 5:17) He further opined claimant did not sustain any functional impairment as a result of the August 6, 2019 right foot injury at TPI. (Id. at 17-18)

Dr. Kuhnlein agreed with Dr. Mulvey on causation of the foot injury. (CE 1:16) He recommended a second opinion for his chronic foot pain. (CE 1:17) Dr. Kuhnlein did not believe Mr. Rogers had reached MMI for his foot, but noted if further interventions were denied, MMI date would be October 15, 2019. (CE 1:18) He rated impairment at 2% of the right lower extremity. (CE 1-18) Dr. Kuhnlein recommended restrictions for claimant of occasional stooping or squatting, crawling, working on ladders and climbing stairs due to his foot injury. (CE 1:19-20) Dr. Matos opined claimant suffered a bone contusion to his right foot as a result of the work incident on August 6, 2019, however this injury resulted in zero percent functional impairment. (DE A:6)

Claimant testified that the treatment from Dr. Mulvey was helpful, but that claimant is not pain free. He continues to have dull and aching pain in his foot that occasionally shoots up his shin. (Tr. p. 34) He also will get a sharp pain in his foot with an extended stride or stretching of the foot, lifting heavy weight, walking too much and standing too long. (Tr. pp. 34-35)

Claimant also maintains he suffered a back injury as a result of his work and that these back issues started shortly after beginning to work for defendant employer. (Tr. p. 36) He said the pains in his back were sharp pains when he would bend and twist his back. (Tr. pp. 36-37) He testified that he thinks he injured his back by yanking the heavy root stand off his foot. (Tr. p. 37) He also testified that he was uncertain but thought the pain in his back got worse when he was in the walking boot. (DE E:11; Depo. pp. 43-44) He said that the prior back issues he had were more like a charley horse whereas his back pain after his work injury was like a stabbing pain radiating into his left leg. (Tr. p. 40) He said that sneezing or coughing would almost take him to the ground and sometimes he could not get back up after being bent over. (DE E:11; Depo. p. 44) He testified that as the injury progressed, he lost strength in his left leg and had urinary incontinence. (Tr. p. 40)

Claimant's first documented back pain was during the August 20, 2019, visit with Dr. Mulvey. (JE 5:1) It was noted again on September 3, 2019, visit with Dr. Mulvey. (JE 5-5) Claimant reported back pain to his personal physician, Dr. Gura, on September 5, 2019, and again on October 29, 2019. (JE 2:23, 28) Claimant reported back pain during a September 12, 2019, visit with Dr. Delbridge when claimant was treating for his right-hand injury. (CE 3-2) The pain was radiating down both legs, left greater than right, and Dr. Delbridge suggested an MRI. (CE 3:2)

On January 7, 2020, his personal physician, Dr. Delbridge, diagnosed him with chronic bilateral low back pain with bilateral sciatica. (JE 1-40) An MRI was performed on January 7, 2020, which revealed:

> L3-4: Mild broad-based disc bulge. Facet arthrosis ligamentum flavum infolding.
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> L4-5: Disc desiccation and a broad-based disc bulge noted. Superimposed central disc extrusion with inferior migration of disc material. Resulting contact and compression of the transiting nerve roots bilaterally. Facet arthrosis ligamentum flavum infolding. Mild canal stenosis. Mild bilateral neural foraminal narrowing with contact of the exiting nerve roots bilaterally.
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> L5-S1: Disc desiccation and a broad-based disc bulge noted. Superimposed right paracentral disc extrusion with slight inferior migration of disc material. Contact and deflection of the transiting right-sided nerve root. Facet arthrosis ligamentum flavum infolding. Moderate bilateral neural foraminal narrowing with contact and slight compression of the exiting nerve roots bilaterally.

(JE 1:41)

This MRI showed degenerative changes most pronounced at L4 to S1. (JE 1:41) Dr. Delbridge noted that that there were urinary problems and increased weakness when he saw his nurse practitioner on January 20, 2020. (CE 3:2) Dr. Delbridge performed a laminectomy L4-5 with foraminal enlargement at L4 nerve root and partial disc excision lumbar four five on the left on January 30, 2020. (JE 6:2) The postoperative diagnosis was herniated lumbar disc L4 on the left with impingement of L5 and S1 nerve root with foraminal stenosis on L4 nerve root. (JE 6-2)

During the February 6, 2020, visit with Dr. Delbridge, claimant reported decreasing pain in the back and resolution of the thigh pain issues as well as the urinary incontinence issues. (CE 3:3) Dr. Delbridge placed claimant at MMI as of July 29, 2020. (CE 3:5)

Claimant was released to return to work with no restrictions. Claimant testified that he needed to return to work because of income issues. He returned to the crane job

for a few months and then was transferred to a mold position. Claimant characterized this as a demotion as it resulted in a pay decrease. The mold job required heavy lifting above his head for which he received assistance. He was subsequently terminated for absences, some of which he attributed to his time off for his injuries.

Dr. Delbridge opined on November 30, 2020, that claimant's current low back pain was the result of moving the root stand off of claimant's own foot on August 6, 2019, and through the use of the CAM boot, which created a leg length discrepancy. (CE 3:3)

These two incidents aggravated claimant's low back condition to the point that claimant needed surgery. (CE 3:3) Dr. Delbridge concluded claimant sustained a 13 percent whole person impairment but assigned no permanent restrictions as claimant needed further treatment. (CE 3:6)

Dr. Kuhnlein evaluated claimant for his back injury and also opined that the back injury was causally related to his injury at work but associated the cause to the gait changes associated with wearing the brace and CAM boot for the foot condition, opining that the treatment "lit up" [1] and materially aggravated the pre-existing low back condition. (CE 1:16) Dr. Kuhnlein prescribed a consult with a spine surgeon for the work-related condition. (CE 1:18) If that recommendation was not followed, he stated that Mr. Rogers would have been at MMI on July 29, 2020. (CE 1:18) Dr. Kuhnlein rated permanent impairment for the back injury to be 13 percent BAW. (CE 1:19) He restricted material handling to 40 pounds from floor to waist, 40 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder. (CE 1:19) He also recommended that claimant be allowed to change positions as necessary. (CE 1:19) The over the shoulder restrictions were due to a combination of the "moment arm" phenomena in the lumbar spine with material handling functions, along with safety concerns due to claimant's right hand dysfunction. Id. Non-material handling restrictions would include sitting, standing, or walking on an as needed basis with the ability to change positions for comfort. (CE 1:19) For stooping, squatting, and crawling, Dr. Kuhnlein recommended these activities be done only occasionally. (CE 1:19)

During Dr. Matos's examination, claimant complained of low back pain that radiated into his feet which ranged from seven on a ten scale with hydrocodone, to ten out of ten. (DE A:3) He described pain in his right foot at seven to eight on a ten scale at worst and five to six at best with hydrocodone and stretching. (DE A:3) During examination he had normal gait and station, normal flexion and extension in the wrists, full flexion and extension with no tenderness to palpation in the lumbar region. (DE A:4)

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[1] Dr. Kuhnlein disagreed with Dr. Delbridge's opinion that claimant's back pain was directly caused by the work injury as there was a lack of back pain complaints in the medical records for five months following the August 6, 2019, incident. "I did not find evidence in the record that Mr. Rogers immediately sustained back pain after the work-related August 6, 2019 injury, with no mention of back pain for approximately five months, during which his gait would have been altered by the use of the CAM boot, as I discussed above," Dr. Kuhnlein wrote. (CE 1:17)

Dr. Matos concluded claimant did not sustain an injury to his low back as a result of the August 6, 2019 injury. (DE A:5) There is no description of a mechanism that would cause back pain, according to Dr. Matos. (DE A:5) The MRI of 2018 showed degenerative disc disease which Dr. Matos observed could have been the result of claimant's jumping from a roof in November 2017 and June 2018. (DE A:5)

According to the work releases of Dr. Delbridge and Dr. Mulvey, claimant was kept off work from August 6, 2019, to October 15, 2019, and then again from January 29, 2020, until sometime in June 2020. The record is not clear as to when claimant returned to work, but the parties agree that it was at least by June 1, 2020. Defendants argue in their brief that claimant returned to work at least by May 6, 2020.

Per the defendants' exhibits, claimant received short term disability benefits from February 12, 2020, through May 5, 2020. (DE F:4) He returned to employment with defendant employer on May 5, 2020, in the crane position. The claim was closed on May 6, 2020, because "RTW-Own ER." (DE F:3) He applied for a position through Manpower and was hired sometime before June 14, 2020. (DE E:2-3) In his supplemental answers to interrogatories, he also indicates that his return to new employment with PCA Conrad through Manpower, a temporary agency, was in June 2020. (CE 4:9)

Based on the foregoing, it is determined claimant returned to work on May 6, 2020.

At PCA he worked on combos, running a box through a machine that puts bands around the boxes. The job involved twisting and bending and lifting up to thirty pounds but mostly between five to ten pounds. He earned approximately $14.00 per hour. He was terminated due to someone else punching in with his timecard which PCA viewed as inappropriate. He has not worked since leaving PCA.

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 R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

There are two work related injuries at issue. The first is an accepted work injury to the foot on August 6, 2019, and the second is an alleged work injury to the back suffered in part directly due to the August 6, 2019, injury and in part due to sequelae from the August 6, 2019, injury.

The claimant argues that if the back issues are unrelated to the work injury, claimant is entitled to benefits from the Second Injury Fund of Iowa.

Claimant has a degenerative condition in his back. It may or may not have been incited by a trauma which occurred in November 2017 when he jumped off a roof. He received treatment for back pain following that incident from November 2017 and into 2018. Claimant testified that he healed through exercising.

He was working full duty without restrictions for defendant employer beginning in June 2019 and had had no treatment for his back injury since July 2018. Dr. Delbridge treated claimant for his back complaints in 2017 and 2018 and then again in 2019 and 2020. There is no expert in the record with more personal experience in regard to claimant's back than Dr. Delbridge. Dr. Delbridge opined claimant sustained an aggravation to a pre-existing back condition when claimant had a root stand pin his foot to the ground. This was the result of both a direct twisting action in removing the stand as well as wearing the CAM boot. While Dr. Kuhnlein disagreed that there was a direct trauma to claimant's back, he did agree that claimant's pre-existing condition was lit up by the right foot injury and subsequent treatment.

Dr. Matos opined differently, but his opinion is less reasoned and Dr. Matos is less familiar with claimant, having only examined claimant once.

Defendants argue that it was an incident in December 2019 which was the cause of claimant's flare-up of back pain, but there is no expert opinion supporting this argument. Dr. Matos opined claimant's back pain was associated with claimant's degenerative condition that could have been triggered by a 2017 incident. Even if the December 2019 incident contributed to claimant's back pain, the standard here is whether the work injury was a substantial contributing factor, not the only contributing factor.

Based upon the opinions of Dr. Delbridge and Dr. Kuhnlein, it is determined claimant's pre-existing degenerative condition was lit up or aggravated by the August 6, 2019, foot injury.

Because of the foregoing, claimant is not entitled to benefits from the Second Injury Fund of Iowa.

The next question is whether claimant gave proper notice of a back injury to defendant employer.

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. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant provided notice of the right foot injury and it was the right foot injury which led to the back injury. Claimant argues that the Commissioner's decision in Conner v. United Parcel Service, File No. 5051783, (App. Dec. February 15, 2019) is on all fours with this case and therefore binding precedent. In Conner, the claimant developed left arm CTS as sequela to the original right shoulder injury and the Commisioner held the 90-day notice provision does not apply to sequela injuries. Even if they did, when claimant applied for short term disability for his back surgery, the defendants should have known that there was the possibility of a potential compensation claim and therefore, claimant gave proper notice.

Defendants argue that they were unaware of claimant's ongoing right foot problems, but this is due to their lack of investigation and not claimant's lack of

communication. It is the defendant that has the ongoing duty of investigation while claimant need only provide notice once within 90 days of the occurrence of an injury.

Claimant is entitled to medical bills that were incurred for treatment to his right foot, ankle and low back.

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 also seeks alternate care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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 1975).

Defendants accepted liability for the right ankle, but required claimant to return to work without restrictions on September 10, 201, after the report of Dr. Tang. After this, claimant was not offered additional care from defendants and the failure to provide additional care was not reasonable.

Therefore, claimant was, and is, entitled to care related to his right ankle and right foot injury. He is entitled to seek out the care on his own due to defendants' refusal to provide care and he is entitled to reimbursement of that care.

Claimant is also entitled to reimbursement and continued care for his low back as it is determined to be a work-related injury, however, defendants are entitled to direct that care.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Dr. Mulvey and Delbridge returned claimant to work with no restrictions based on the foot injury and opined claimant suffered no permanent impairment. Dr. Matos agreed. Dr. Kuhnlein assessed a 2 percent lower extremity impairment rating with restrictions of only occasional stooping, squatting, crawling, working on ladders or climbing stairs. Based on the two treating physicians' opinions, it is determined claimant is not entitled to any permanent benefits arising from his right foot injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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 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.

Only Dr. Kuhnlein has issued restrictions based on the back injury, although he and Dr. Delbridge both believe it is premature as claimant has not had proper treatment for the low back. Dr. Kuhnlein rated permanent impairment for the back injury to be 13 percent BAW as did Dr. Delbridge.

Claimant is a younger worker with a high school education. He has the ability to study and pass tests. He has been certified to use heavy equipment in the past. He has exhibited varying motivations in regard to returning to work. He found a new job with Manpower soon after being terminated from defendant employer. However, since his termination from Manpower, claimant's search for new employment appears lackluster. It is a pandemic, however, which may have attributed to it, but his testimony regarding post-termination work was vague. He stated that he was looking but could not find a job he liked. (TR p. 54) His physical condition was not such that it prevented him from obtaining new employment with Manpower.

It is found claimant has sustained a 13 percent industrial loss as a result of the back injury.

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).

It was previously found claimant was off work from August 6, 2019, to October 15, 2019, for his foot and from January 29, 2020, through May 5, 2020, for his back. He is entitled to temporary benefits for those periods.

Defendants paid short term disability and to the extent those disability benefits were paid during claimant's time off of work from August 6, 2019, to October 15, 2019, and from January 29, 2020, through May 5, 2020, defendants would be entitled to a credit against temporary benefits owed. Iowa Code section 85.38(2).

Claimant seeks reimbursement for an independent medical examination. 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.

Dr. Matos issued a zero percent impairment rating on November 20, 2020. Claimant argues that Dr. Kuhnlein's report was issued on December 24, 2020, however, per the report, the examination took place on September 8, 2020. Thus, Dr. Matos's opinion was not conducted prior to the examination conducted by Dr. Kuhnlein. Claimant is not entitled to reimbursement of IME of Dr. Kuhnlein.

Claimant also seeks a finding of penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
>
> > If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of

> compensation is not timely . . . or when the full amount of compensation is not paid.
>
> Id.
>
> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
>
> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
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> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Defendants denied the claim for the low back injury and closed the file for the ankle injury on September 10, 2019, based on a record review conducted by Dr. Tang. Claimant did return to work with no restrictions and sought out treatment on his own. The defendants appear to argue that the liability for these injuries is "fairly debatable" based on the records review of Dr. Tang and claimant's return to work without restrictions. Dr. Delbridge also returned claimant to work on October 10, 2019, with no restrictions. Dr. Mulvey returned claimant to work with no restrictions as of October 15, 2019. In the meantime, claimant received short term disability for the period of time which he was off work for his ankle.

Defendants conducted no investigation as to whether claimant's back pain was related to the work injury. They argue that they did not have proper notice, but they also did not follow up with claimant's continued treatment for his right foot injury. The athletic trainer on site never asked claimant whether his foot had recovered. When claimant filed for short term disability, there were no questions by the defendant employer as to whether this was work related. Claimant testified that he informed the defendants of his work-related foot injury, but was told it could not be accommodated due to claimant seeking treatment on his own.

It is found that defendant made a bare assertion that the claim was fairly debatable. There was little investigation in the beginning and no continuing investigation

as is required by statute. Thus, claimant is entitled to penalty benefits. It is found that claimant is entitled to 25 percent penalty benefits of all late paid benefits due to the lack of a quality investigation and ongoing investigation.

Claimant seeks the award of costs. While Dr. Kuhnlein's examination is not recoverable under Iowa Code section 85.39, the report fee can be awarded as a cost. Additionally, the report costs of Dr. Delbridge can also be awarded under 876 IAC 4.33. The transcript and filing fee are also allowable costs pursuant to 876 IAC 4.33.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant sixty-five (65) weeks of permanent partial disability benefits at the rate of five hundred forty-six and 66/100 dollars ($546.66) per week from May 6, 2020.

That defendants are to pay unto claimant temporary benefits from August 6, 2019, to October 15, 2019, for his foot and from January 29, 2020, to May 5, 2020.

That defendants are entitled to credit for the short term disability paid during claimant's time off of work from August 6, 2019, to October 15, 2019, and from January 29, 2020, to May 5, 2020.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That claimant is entitled to reimbursement of medical bills associated with his foot and ankle injury and the low back pain.

That claimant is entitled to penalty benefits of twenty-five (25) percent on all late paid benefits.

That claimant is awarded the report costs of Dr. Delbridge and Dr. Kuhnlein, the costs of the transcript and the filing fee.

That claimant is entitled to alternate care with the providers of his choosing for his right foot injury and that claimant is entitled to future medical care for his back injury directed by the defendants.

Signed and filed this _____23rd____ day of July, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Timothy Wegman (via WCES)

Meredith Cooney (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.