BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FELTON LEWIS, Claimant, vs. SEDONA STAFFING, Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 11 2019 WORKERS' COMPENSATION	File No. 5059960 ARBITRATION DECISION Head Notes: 1108, 1402, 1802, 1803, 3000, 3002, 3800

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Felton Lewis, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 30, 2017. Claimant alleged he sustained a work-related injury on approximately August 5, 2017. (Original notice and petition)

For purposes of workers' compensation, Sedona Staffing, is insured by ACE American Insurance Company. Defendants filed their answer on November 14, 2017. The defendants denied the occurrence of the work injury.

Originally claimant was represented by Mr. James P. Hoffman. However, Mr. Hoffman was contacted by his client and informed the client no longer wished Mr. Hoffman to represent him in this matter. On November 8, 2018, Deputy Heather Palmer ruled Mr. Hoffman was granted the right to withdraw as attorney of record. On November 26, 2018, claimant indicated he would be representing himself in the present action.

The hearing administrator scheduled the case for hearing on December 5, 2018. The hearing took place at 150 Des Moines Street, Des Moines, Iowa. The undersigned appointed Ms. Buffy Nelson, as the certified shorthand reporter. She is the official

custodian of the records and notes. A transcript of the proceedings was filed with the Iowa Division of Workers' Compensation on December 18, 2018.

Claimant testified on his own behalf via telephone conference call. Defendants called Ms. Kelly Weaver, of Sedona Staffing to testify at the hearing. Joint Exhibits 1 through 7 were admitted. Defendants offered Exhibits A through H. All exhibits were admitted as part of the record. The case was deemed fully submitted on December 18, 2018.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Temporary benefits are not at issue;
3. If permanency is awarded, the permanency would be calculated by the industrial method;
4. If permanency is awarded, the parties agree the commencement date is August 2, 2017;
5. The parties believe the weekly benefit rate is $258.86;
6. Defendants have waived their right to any affirmative defenses;
7. Medical benefits are not in dispute;
8. The parties agree claimant has paid certain costs prior to the hearing.

ISSUES

The issues presented are:

1. Whether claimant sustained an injury on August 1, 2017 which arose out of and in the course of his employment;
2. Whether the alleged injury is a cause of temporary and/or permanent disability;
3. If permanency is found, there is the issue as to the extent of permanency; and
4. Whether Iowa Code section 85.34(7) is applicable in this case.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and Ms. Weaver, after judging the credibility of the witnesses, plus after reading the evidence, makes the following findings of fact and conclusions of law:

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

Claimant is 42 years old and single. He is currently unemployed. He cannot recall the last time he was employed. He knows he worked for a company named Focus. He worked 20 hours per week at $8.00 per hour. Claimant testified he voluntarily terminated the position because there was prolonged sitting and he became too stiff at the end of his shift. Exhibit F, page 47 shows claimant was hired on August 2, 2017. He voluntarily quit on October 4, 2017. He was rehired on January 12, 2018. It is not known whether he worked after that date. (Ex. F, p. 47)

In 2016 claimant was working for Colony Brands, Inc. Claimant reported he sustained a work-related injury to his back on October 11, 2016. The report was generated on October 20, 2016. Claimant described the incident as follows:

> On 10-11-16 approximitly [sic] 6:30 pm I was on a [an] order picker doing replenishing when I was finish replenishing on Level Raels [sic] I After lifting a box about 35 pounds and relifting to return box back to its location I then came down to ground level when I felt a sharp pain in my lower back too painful to continue working, so I then notified supervisor Mike Hoffman that I was in too much pain to continue to work after lifting A box from Replenishing, so I went home around 6:40 p.m.

(Ex. E, p. 35)

Mr. Dean Hansen conducted an investigation of the reported work injury on October 21, 2016. Mr. Hansen wrote the following with respect to the events on October 11, 2016:

> On 10/11 at approx. 6:30 pm Felton claimed he was doing replenishments on the Order Picker at the upper level "I". He lifted a box containing clothes that he estimated at 35 lbs. and placed it on his OP pallet. He then took out the qty he needed and lifted the box to place it back in the original location. He lowered himself back down to ground level and at this point Felton said he felt a sharp pain in his lower back. Felton determined the pain was too bad to continue doing his job so he went to the office to find his Supervisor.

> Felton told Mike Hoffman (his Supervisor) that he was in pain and needed to go home to take his medication that had previously been prescribed to him by his Dr. Felton left at 6:54 pm. Mike Hoffman said Felton did not tell him why he was in pain or that he just hurt himself at work.
>
> On 10/12 Felton called in "sick person". No mention of this being work related.
>
> On 10/13 Felton called in again and spoke with Carrie Fadale. He reported that he was under Dr care and was on bedrest until further notice. Again, no mention of this being work related.

(Ex. E, p. 38)

RELEVANT TREATMENT RECORDS PRIOR TO August 1, 2017

Claimant's personal physicians were located at Community Health Care, Inc. He was restricted from working by Ashley Fuller, ARNP from October 6, 2016 through October 10, 2016. (Joint Exhibit 1, p. 1) Brooke M. Determan, ARNP restricted claimant from work for the period from October 4, 2016 through October 16, 2016. Claimant was allowed to return to work without any restrictions on October 17, 2016. (Jt. Ex. 1, p. 2)

On October 18, 2016, claimant reported to Community Health Care, Inc. While the copy of the records was very difficult to read due to a malfunctioning copy machine, claimant was assessed as having: "Acute bilateral low back pain without sciatica." (Jt. Ex. 1, p. 3) During the same examination, claimant reported the following medical history:

1. Back pain.

   Severity level is 6. Location of pain is lower back. Pain is radiated to the back. The patient describes the pain as sharp and shooting. Context: bending over. Symptoms are aggravated by bending, lying/rest, twisting and walking. Symptoms are relieved by rest. Additional information: Pt is having persistent low back pain, XR shows nothing acute. Would like MRI. PT woke up with sore back first day of October, had OV, treated. He return [sic] to my office to follow up after aggrevating [sic] it on 10/11. Had to leave work, supervisor notified.

(Jt. Ex. 1, p. 4)

On October 21, 2016, claimant presented to the Colony Brands Wellness Clinic. (Jt. Ex. 2, p. 16) Stephanie Johnson, ARNP, examined claimant. Nurse Practitioner Johnson found the following with respect to claimant's back:

BACK: Back symmetric, no curvature. Thoracic non tender to palpation. Lumbar spine tender upon palpation around L4-L5 region. Lumbar paraspinal muscles tender on the left. ROM limited due to pain (pt not wanting to attempt certain maneuvers in fear of eliciting pain-including lumbar extension, lateral movements, and standing on toes). No CVA tenderness. Left leg lift induces expressed low back pain at about 60 degrees. No pain with right leg lift.

EXTREMITIES: Extremities normal. No deformities, edema, or skin discoloration. Able to stand on heels without difficulty.

....

Assessment and Plan:

1. LBP:

Gabapentin 300mg tid. Use and side effects given

Advised to continue the NSAIDS given by PCP

Alternate ice and heat to area of discomfort

Advised not to stay in one position for too long as this may aggravate symptoms. Would like pt to stay mobile-as tolerated

Back to work with restrictions listed x 1 week (no forklift driving or lifting; sitting primarily with standing/walking when needed)

Revisit in one week to re-evaluate

(Jt. Ex. 2, p. 17)

On October 27, 2016, claimant returned to the Colony Brands Wellness Clinic. (Jt. Ex. 2, p. 18) Claimant denied numbness and tingling but expressed a sharp pain in his back. (Jt. Ex. 2, p. 18) Claimant was not totally compliant with the recommendations Nurse Practitioner Johnson gave to her patient. The nurse examined the back and reported in her clinical notes:

BACK: Back symmetric, no curvature. Thoracic non tender to palpation. Lumbar spine tender upon palpation around L4-5 and sacral region. Lumbar paraspinal muscles tender bilaterally, ROM limited due to pain (pt not wanting to attempt any maneuvers in fear of eliciting pain-including lumbar extension, lateral movements, flexion/extension, and standing on toes). No CVA tenderness. Only able to lift legs to about 10 degrees while lying supine until pt advises to stop due to pain.

EXTREMITIES: Extremities normal. No deformities, edema, or skin discoloration.

....

ASSESSMENT AND PLAN:

1. LBP

Assessment/examination was limited due to verbalization of pain

Hydrocodone refilled. Use and side effect given

Pt was highly encouraged to take NSAIDS and ice to reduce inflammation and pain

Will refer pt to ortho for further evaluation and treatment

Back to work with the same restriction until seen by orthopaedics (no forklift driving or lifting);

sitting primarily with standing/walking when needed)

Pt verbalizes understanding

Released from care

(Jt. Ex. 2, p. 19)

Claimant was referred to Michael Dolphin, D.O., an orthopaedic surgeon in Davenport, Iowa. (Jt. Ex. 4, p. 22) Dr. Dolphin's initial diagnosis was "Strain of muscle, fascia and tendon of lower back, initial encounter." (Jt. Ex. 4, p. 24) Dr. Dolphin initiated a treatment plan for claimant. It consisted of:

Plan:

Lumbar: I do not see any evidence of nerve impingement. I believe this is muscular. It does not require surgery or an MRI at this time. I am recommending 2-4 weeks of PT with progression to work conditioning. I am recommending light duty with ability to change position hourly as needed. I will follow up with him in 4-5 weeks.

(Jt. Ex. 4, p. 24)

Dr. Dolphin placed claimant on light duty. Claimant had a maximum lift of 5 pounds. He could frequently lift or carry up to 5 pounds. Claimant was also to alternate between sitting and standing as needed. (Jt. Ex. 4, p. 25)

On November 9, 2016, claimant underwent magnetic resonance imaging (MRI). The results were interpreted by Casey Veach, M.D. The test showed:

1. There may be a congenital component of spinal stenosis as the AP dimension of thecal sac is only 9 mm.

2. Disc protrusion at L5-S1 which results in mild to moderate bilateral foraminal narrowing, right greater than left

3. The conus ends somewhat low at L2-L3.

(Jt. Ex. 3, p. 20)

Claimant returned to Dr. Dolphin on November 15, 2016. Claimant complained of sharp and shooting pain in the lumbar region that occurred intermittently. (Jt. Ex. 4, p. 27) Claimant also had bilateral buttock pain, groin pain, and bilateral leg pain with the left worse than the right. (Jt. Ex. 4, p. 27) Dr. Dolphin was presented with the Mercy MRI. Dr. Dolphin interpreted the MRI as showing a small central disc protrusion between L5 and SI. (Jt. Ex. 4, p. 28) Dr. Dolphin refused to prescribe narcotic pain medication for claimant. The physician referred claimant to a pain clinic. (Jt. Ex. 4, p. 29)

On December 6, 2016, claimant returned to Dr. Dolphin. Claimant's symptoms were basically the same as the symptoms he experienced on November 15, 2016. Claimant reported he had been taking Naproxen, Tramadol, and had just completed a Medrol dose pack. (Jt. Ex. 4, p. 31)

Dr. Dolphin discussed the issue of medical causation with claimant. The clinical notes regarding the topic are duplicated below:

Plan:

Lumbar: Complains of right groin pain that radiates to the middle of the right thigh. Down both calf's [sic] with pins and needles and excruciating pain that comes and goes. Also buttock pain bilaterally. Worse when sitting for too long. Worse with coughing and sneezing. But when laying flat on his back. Has been doing PT. Not been working. We discussed sending him for an injection in the past and he has a phobia of needles, so he is reluctant to consider an ESI.

I discussed that there are records that predate his injury report, indicating back pain. As such, there is no way for me to determine causation, definitively, one way or another.

He would like to continue with PT. He is not prepared to return to work in any capacity. He is adamant that he wants this fixed. I will continue with

> keeping him off for another two weeks. He will consider the option of an ESI during the next two weeks.

(Jt. Ex. 4, pp. 32, 33)

Claimant returned to see Dr. Dolphin on January 12, 2017. Claimant reported his left leg had improved since his last appointment. (Jt. Ex. 4, p. 35) Claimant stated he had not attended physical therapy because his then employer would not provide transportation to and from the therapy sessions. (Jt. Ex. 4, p. 35) Claimant stated he feels the best when he is taking pain medication and lying flat. Dr. Dolphin's plan included:

> **Plan:**
>
> Lumbar: He indicates that he has not been going to physical therapy. The back is better if he doesn't sit too long. He still complains of nerve pain in the right thigh and right knee. Feels he is healing. He is 10% better. Not working. No car, so he walks to his personal doctor from the bus stop which makes him have more back pain. Has an attorney that is working on helping him with rides.
>
> I recommended an ESI in the past. He is ready to go for one if it is authorized. He also is wanting to return to PT as he feels that the education on stretching and strengthening were helpful. We will recommend that he resume this as well. I will see him back two weeks after the injection is completed. He indicates that he cannot walk to work at this point, for fear that it will aggravate his lower back. As such, if there is some type of transportation available, then I will recommend he return to work for sedentary job with the ability to change positions (sit-stand) every 15 minutes as needed. We will refill Tramadol #60.

(Jt. Ex. 4, p. 36)

Dr. Dolphin released claimant to return to work. Claimant was allowed to perform modified duties. He could perform sedentary work. His lifting was limited to 10 pounds. Claimant could occasionally carry small objects too. Finally, claimant was to change positions from sitting to standing every 15 minutes. (Jt. Ex. 4, p. 37)

Dr. Dolphin treated claimant on March 23, 2017. (Jt. Ex. 4, p. 38) Claimant was working with restrictions but he questioned the restrictions. He was attending physical therapy without relief but he did think stretching helped his back pain. (Jt. Ex. 4, p. 38) In his treatment plan, Dr. Dolphin recommended:

> **Plan:**
>
> Lumbar: His primary issues are intermittent anterior thigh discomfort and nerve pain. He is using Tramadol and Gabapentin. He has finished the

> Gabapentin. It did help. He feels that work is aggravating things. The bending and moving at work are causing him to have worse pain after work. He feels he isn't going forward, but at times going backward. He only has discomfort on the right.
>
> He is 50% better overall, but has not progressed to the degree we would expect. I am recommending that he go for an FCE for quantification of his restrictions. I will discontinue PT at this point as well. In the interim, we will continue with his present restrictions with an emphasis on rare bending.

(Jt. Ex. 4, p. 39)

Dr. Dolphin opined claimant was capable of performing sedentary work. He could lift and carry up to 10 pounds. Claimant could rarely engage in bending. He could alternate sitting and standing. (Jt. Ex. 4, p. 40)

Claimant met with Dr. Dolphin on April 12, 2017. Claimant's nerve pain had increased on the right from the buttock to the anterior thigh and knee. (Jt. Ex. 4, p. 42) The Gabapentin was helping slightly. Claimant said his pain was worse with activities. The pain ran along the front of the right thigh to the knee anteriorly. There was no pain posteriorly down below the knee. (Jt. Ex. 4, p. 42)

On April 18, 2017, claimant participated in a functional capacity evaluation at E-3 Work Therapy Services. (Jt. Ex. 5, p. 48) A summary of the findings are found below:

> Result:
>
> The overall classification of effort is invalid due to the client, Felton Lewis, performing inconsistently during a repeated measures protocol. The client failed to give maximum voluntary effort during today's FCE. Therefore, it is undeterminable at this time safe, maximum lifting capabilities and/or other functional capabilities.
>
> Reasoning for Invalid Categorization
>
> There is an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS Lever Arm. Overall Percent Change = 66.0%
>
> Additional Supportive Reasoning for Invalid Categorization
>
> Breakaway/Cogwheeling was present during the manual strength testing and the lifting evaluation.
>
> Extreme overt pain behaviors, including grimacing and groaning, were noted during this test.

(Jt. Ex. 5, p. 48)

The administrator of the FCE noted particularly:

> The client failed to give maximum voluntary effort during today's FCE. Therefore, it is undeterminable at this time safe, maximum lifting capabilities and/or other functional capabilities.

(Jt. Ex. 5, p. 51)

On April 20, 2017, claimant returned to see Dr. Dolphin. Claimant complained of right buttock pain down his anterior thigh and it stopped at his knee. (Jt. Ex. 4, p. 44) Claimant revealed he had an abnormal urine analysis, and as a consequence, the pain clinic he had been attending would no longer treat claimant with narcotic pain medication. (Jt. Ex. 4, p. 44)

Dr. Dolphin developed the following treatment plan for the lumbar spine:

> **Plan:**
>
> Lumbar: At this visit, the patient has complaints of right sided lower back pain. We provided him with some Ibuprofen/pepcid samples, and he took one immediately to help with his current pain level. He was scheduled to review the FCE results so that we could determine restrictions moving forward in an effort to return him to work. Unfortunately, the results of the test came back invalid. As such, I cannot recommend any restrictions.
>
> He also indicates that he was discharged from the pain clinic secondary to abnormal findings on a urine analysis. I do not have these records. Unfortunately, there is no other pain clinic that I can recommend. Perhaps there is one in Dubuque. I am recommending that his workman's [sic] compensation provider resume care for Mr. Lewis and direct care moving forward. He does not require surgery for his complaints, and I cannot provide any restrictions due to the lack of a valid FCE.

(Jt. Ex. 4, p. 45)

On May 17, 2017, Lynn Mathison, Human Resource Manager for Colony Brands, Inc. sent a letter to claimant, advising him of his termination for failure to call into work for three days in a row. The letter provided in relevant portion:

> On 05/10/2017, Terri Luett sent you a letter outlining your need to provide a doctor slip for your time off by Monday, 05/15/2017. On 05/11/2017, you called Terri Luett and notified her that you received the letter.
>
> It was expected that you would return to work on Monday or provide a doctor slip excusing your time off. As of today, you have not called into

> work for the past three days. In addition, you have failed to provide a doctor's slip for the past three weeks of work you have missed. Our policy indicates that it is your responsibility to call into work within an hour of the start of your shift. Two consecutive days without calling in is considered a quit without notice. Based on this, your employment has been terminated effective immediately.
>
> ....

(Ex. E., p. 45)

The official records at the Iowa Division of Workers' Compensation establish that claimant entered into a compromise special case settlement with Colony Brands, Inc. on June 20, 2017. The File Number for the case was 5058851. Claimant settled the case for $11,033.85.

RELEVANT MEDICAL TREATMENT FOLLOWING August 1, 2017

Claimant applied for work through Sedona Staffing to work at Collis Inc. Claimant was hired to work as a "powdercoating line operator". (Ex. B, p. 4) The duties included in the position were detailed in Exhibit B, page 4. Claimant commenced Working at Collis on August 1, 2017. (Ex. B, p. 12)

Claimant testified at his hearing:

> MR. LEWIS: Collis Incorporation, and I was there roughly about two hours, but an hour into it I noticed that my back was starting to get aggravated. I started to feel stiffness on it and little aches. And so about two hours I took my break, I was allowed to take my break. And once my break was over, I stood back up, and I noticed that my back was real - - even more stiffer [sic], so I went and notified the supervisor for that shift and let him know that I couldn't continue with the shift. And he told me to notify Sedona Staffing. And I said that I would. And by the time I left from work, I tried to call them, but they were already closed.
>
> So I went home, and I called them the next day and explained to them what had happened, that my back issues - - like I had told - -
>
> THE COURT: I'm going to ask you to slow down, because I'm taking notes, and I can't keep up with you. So you called the next day to Sedona?
>
> MR. LEWIS: Yes, yes, and informed them that I could no longer finish that work assignment due to my back condition, that I had aggravated my back once again. And they told me to come in and make a note of it and come make a report of it. And so I did that.

> And so from then on I'm just still basically ignorant on the work comp laws and everything, looked for another job that was more suitable for me, a sit-down job, which turned out not to be so good, because I didn't realize how bad my back was at the time. So obviously I couldn't do any stand-up work and reaching and bending and stuff like that, so I looked for a sit-down job at Focus, and I did that for as long as I could. But that didn't pretty much work out because my back was even getting more aggravated. So I had informed Sedona Staffing after I went to my doctor and my doctor told me once again, "This was a work issue. You have to inform your employer."

(Tr., pp. 8-10)

On August 2, 2017, claimant telephoned Sedona Staffing on two occasions. During the first telephone call, the notation stated:

> Spoke to Felton and he said that he let Lance know last night that he had to let the owner of his apt. into his apt. Felton said that Lance told him he could return on Wed. I told him to make sure he is there and not to leave early any more.

(Ex. B, p. 12)

During the second telephone conversation, the notation stated:

> Assignment Resigned
>
> Called back and resigned b/c of the bending over. He really wants clerical work now.

(Ex. B, p. 12)

Later on August 17, 2017, claimant again telephoned Sedona Staffing. This time he wanted to inform the supervisors the real reason he left Collis after working only two hours was because the job duties were aggravating claimant's previous back injury. Claimant wanted to fill out proper paperwork so he could see a physician pursuant to workers' compensation laws. (Ex. B, p 13)

Claimant did not immediately complete the designated paperwork. He declined to take a post-accident urine test. (Jt. Ex. 6, p. 59) Claimant said he did not want any medical provider to watch him give a urine sample. (Tr., pp. 11-12)

On October 16, 2017, claimant visited the Occupational Medicine Clinic at Clinton Occupational Health. (Jt. Ex. 6, p. 59) Claimant described his accident as:

PATIENT DESCRIPTION OF ACCIDENT

> Mr. Lewis stated that he was hanging hangers on a line while working at Collis. He states he had to do repetitive lifting and bending over the two hour work period. He states that after 1 hour his back was stiff. He stated that he lasted another hour before his back hurt so much he had to quit working.

Claimant provided a history of his back symptoms since August 1, 2017. He informed Delos Carrier, M.D., the following:

> Felton's primary problem is pain located in the low back, right thigh, right knee. The problem began on 08/01/2017. He considers it to be severe. He has noticed that it is made worse by sitting. Felton says that it seems to be variable. It is improved with Ibuprofen. His pain level, on a scale of one to ten, is 8. He stated that he had a previous Work comp injury to his lower back in 2016. He described it as throbbing.
>
> Felton's secondary problem is pain located in the left calf. He describes it as achy, sharp. He considers it to be severe. The problem began on 08/01/2017. Felton says that it seems to be variable. He has noticed that it is made worse by unknown. It is improved with Ibuprofen. His pain level, on a scale of one to ten, is 8.

(Jt. Ex. 6, p. 59.3)

Claimant requested Tramadol for pain control. Dr. Carrier refused to prescribe a narcotic for a work injury that occurred two and one-half months prior. (Jt. Ex. 6, p. 59.3) Dr. Carrier also questioned claimant whether the patient was recording the conversation with the doctor. Claimant denied any such recording. (Jt. Ex. 6, p. 59.4)

Dr. Carrier conducted a thorough examination of claimant's back and legs. (Jt. Ex. 6, p. 59.6) The occupational medical doctor diagnosed claimant with "Lumbago with sciatica, right side." (Jt. Ex. 6, p. 59.6) Dr. Carrier provided the subsequent aftercare instructions:

> Take Ibuprofen 600 mg, one tablet four times a day (every six hours) as needed for pain, swelling, inflammation and stiffness. Take with food. Watch for stomach side effects; if side-effects develop stop medication and call the clinic. Begin a range of motion exercise and walking program. Return here for your follow-up visit in 7-10 days. Contact us if you have any questions or problems.

(Jt. Ex. 6, p. 59.6)

The undersigned found the "DISCUSSION" portion of Dr. Carrier's October 16, 2017 notes to be somewhat curious. The DISCUSSION is duplicated in its entirety below:

> DISCUSSION
>
> Note: There are a lot of concerns that I have with this case. I am writing my concerns because I will be leaving Iowa in two weeks and the follow-up provider needs to be aware of my concerns. 1. There was a late reporting of this injury; although he met the 90 day requirement. 2. He worked for Collis/Sedona for only two hours when he injured himself. I am sure if this was a "light duty" job or required heavier lifting as reported by Mr. Lewis. 3. There was some non-physiologic findings during the examination (back pain with axial loading of the cervical spine and with rolling the trunk and hips as a unit). 4. Legal counsel is involved with this case even before his first visit with me. 5. He was requesting a narcotic (Tramadol) for his pain even though he is 2 ½ months out from his injury.
>
> Mr. Lewis states he only wanted medication at this visit, but also voiced the possibility of physical therapy. I would like to review his previous medical records before making a determination of causality for this injury. I best [sic] this is an aggravation of a pre-existing injury.

(Jt. Ex. 6, pp. 59.6-7)

Claimant returned to Dr. Carrier on October 23, 2017. (Jt. Ex. 6, p.59) During the appointment, claimant admitted to over-medicating with the cyclobenzaprine that had been prescribed to him at his initial appointment. (Jt. Ex. 6, p. 59) Claimant also misled Dr. Carrier about his previous back injury at Colony Brands, Inc. Claimant said the prior work injury was to the upper back and not to the lower back. The statement was a total mischaracterization of claimant's work injury. Dr. Carrier had reviewed claimant's previous medical treatment. He knew claimant had not been completely honest with him.

Dr. Carrier diagnosed claimant with lumbago with sciatica on the right side. The physician prescribed 30 tablets of 800 mg of Ibuprofen. Chiropractic care was also recommended. (Jt. Ex., p. 62) Claimant was placed on restricted duty. He was not to engage in bending and twisting. (Jt. Ex. 6, p. 64) Dr. Carrier stated: "The cause of this problem is undetermined." (Jt. Ex. 6, p. 63)

Effective sometime after the October 23, 2017 appointment, defendants denied claimant's claim as work-related. Defendants would not cover the cost of any medical treatment. Nevertheless, claimant returned to Clinton Occupational Health. Camilla J. Frederick, M.D. examined claimant on November 16, 2017. Claimant's chief complaint was "Low Back Pain." (Jt. Ex. 6, p. 66) Dr. Frederick indicated: "The cause of the problem is undetermined." (Jt. Ex. 6, p. 70) Dr. Frederick renewed the prescription for

800 mg of Ibuprofen. Claimant was instructed to take one tablet every six hours as needed for pain, swelling, inflammation and swelling. (Jt. Ex. 6, p., 70) Dr. Frederick spent 60 minutes with the patient. The physician expressed the following concerns about the case:

> There are a lot of concerns that I have with this case:
>
> 1. There was a late reporting of this injury; although he met the 90 day requirement.
>
> 2. 2. He worked for Collis/Sedona for only two hours when he injured himself. I am unsure if this was a "light duty" job or required heavier lifting as reported by Mr. Lewis. He had not work [sic] for a year prior due to LBP.
>
> 3. There was some non-physiologic findings during the examination (back pain with axial loading of the cervical spine and with rolling the trunk and hips as a unit, inconsistent strength and ROM see exam section).
>
> 4. Legal counsel is involved with this case even before his first visit with me.
>
> 5. He [sic] back pain prior to his 10-11-16 injury (two injuries ago) which resulted in Dr. Dolphin not being able to address causation, but, according to the patient was an upper back injury. It was not, it was a low back injury.
>
> 6. He had an invalid FCE. Resulting in termination of care.
>
> 7. Mr. Lewis has had medication issues in the past resulting in his being discharged from a pain clinic after a urinalysis and he was taking higher doses of cyclobenzaprine after being specifically told not to take more than one per day (he took two at a time.)

(Jt. Ex. 6, p. 70)

Dr. Frederick restricted claimant to bending and twisting on a rare basis. (Jt. Ex. 6, p. 71) Claimant was scheduled for an appointment on November 30, 2017 at 11:00 a.m. There was no record of claimant attending such an appointment.

RELEVANT OPINIONS FROM MEDICAL EXPERTS

Claimant obtained an independent medical examination from Sunil Bansal, M.D., M.P.H. The examination occurred on February 16, 2018. Claimant described to Dr. Bansal how the injury occurred on August 1, 2017. Dr. Bansal conducted a physical examination of claimant. The examining physician found tenderness to palpation over the lower lumbar paraspinals with guarding noted. (Jt. Ex. 7, p. 77) Dr. Bansal also

found a loss of sensory discrimination over the posterolateral thigh. (Jt. Ex. 7, p. 78) The diagnosis given was: "Aggravation of L5-S1 disc protrusion." (Jt. Ex. 7, p. 78)

With respect to causation, Dr. Bansal opined:

> CAUSATION:
>
> At the time of his injury, Mr. Lewis was employed by Sedona Staffing. On August 1, 2017, he sustained an injury to his back.
>
> He was assigned to work on a line with steel hangars on a rack, and he was supposed to pull them on the line. He had been doing this for about two hours, repetitively bending over and grabbing the hangers. He was not supposed to grab just one, but multiple hangers at a time to keep up with the line. The representative at the temporary agency had not really investigated the job description, as this turned out to not be a good job for him because of the repetitive bending and reaching. After two hours of working, he told the supervisor that he could not do it.
>
> It is my medical opinion that the repetitive bending he performed on August 1, 2017 aggravated his pre-existing lumbar spine condition, specifically the disc protrusion at L5-S1.
>
> Disc pressure is increased 100 to 400% in the forward flexed spine position, greatly increasing the likelihood of disc bulging and annular tearing.

(Jt. Ex. 7, pp. 78-79)

Finally, Dr. Bansal provided a permanent impairment rating for claimant. The evaluating physician provided a 3 percent permanent impairment rating for the work injury on August 1, 2017. Dr. Bansal based his opinion on The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-3. (Jt. Ex. 7, p. 79)

Dr. Frederick also provided her expert opinions in a report that was dated August 8, 2018. (Ex. D) Dr. Frederick diagnosed claimant with "Low back pain." The treating physician found many inconsistencies in claimant's rendition of his prior work injury. Dr. Frederick summarized her opinions in her final paragraph at Exhibit D, page 30. She wrote:

> 1. After review of records from CHC, Mercy Medical Center, Dr. Dolphin, Dr. Kari and Dr. Bansal, within a reasonable degree of medical certainty, it appears that Mr. Lewis had ongoing LBP and BL RT > LT leg pain that had not resolved and was at most temporarily aggravated by hanging hangers on the line. His symptoms on my last visit 11/16/17 seem to be improved over his baseline. Therefore, within a reasonable degree of medical certainty, in my opinion, he is at MMI. He requires no

> further treatment. He has sustained no further PPI over an [sic] above that from his prior injury. If you have any further questions please do not hesitate to contact me.

(Ex. D, p. 30)

RATIONALE AND CONCLUSIONS OF LAW

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.

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, 908, 76 N.W.2d 756, 760-61 (1956). It 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, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The greater weight of the evidence shows claimant suffers from a pre-existing injury that he sustained when he worked at Colony Brands, Inc. The undersigned did not find claimant to be an especially credible witness. Claimant initially reported he left Collis after only two hours of work because he had to unlock his apartment to allow the landlord into the place. He did not report he sustained an injury at work. The excuse was made on August 2, 2017 in a telephone call to Sedona Staffing. Later the same

day, claimant again called Sedona Staffing and resigned from his job at Collis. He resigned because there was too much bending on the job and he wanted clerical work.

Claimant made no mention of an injury on the job. It was not until August 17, 2017, that claimant even discusses the work at Collis aggravated his old back injury. Then management asked claimant to complete the proper application for workers' compensation benefits. The papers were not completed until approximately October 16, 2017. Then claimant refused to provide a post-accident urine sample. That is questionable. Claimant reported to the physicians at Clinton Occupational Health his prior work injury was to the upper back not the lower back. The statement was a total fabrication of the true nature of claimant's injury. The physicians found some non-physiologic findings during their various examinations. Claimant kept requesting narcotic medication. At one point, he stated, he only wanted medication for pain. He was taking more medication than prescribed. He had experienced prior medication issues in the past. He had been discharged from a pain clinic for having an abnormal urinalysis.

For all of the foregoing reasons, it is the determination of the undersigned; claimant did not establish by a preponderance of the evidence that he sustained an injury on August 1, 2017, that arose out of and in the course of his employment. As a consequence, claimant takes nothing from these proceedings.

The final issue is the matter of costs.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code

> section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

ORDER

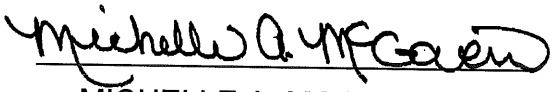
THEREFORE, IT IS ORDERED:

Claimant takes nothing from these proceedings.

Each party shall pay his/its/their own costs.

Defendants shall file all reports as required by law.

Signed and filed this 11th day of January, 2019.



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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.