BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID MYERS,

Claimant,

vs.

R.R. DONNELLEY & SONS COMPANY,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5043505

APPEAL

DECISION

Head Note Nos.: 1403.30, 1803, 2402

Claimant David Myers appeals from an arbitration decision filed on January 29, 2015. Defendants R.R. Donnelley & Sons Company, employer, (hereinafter Donnelly) and its insurer, New Hampshire Insurance Company, respond to the appeal. The case was heard on May 14, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 12, 2014.

The deputy commissioner found the correct injury date for claimant's low back cumulative trauma injury, which arose out of and in the course of claimant's employment with defendant-employer, is February 25, 2009, rather than the alleged injury date of August 22, 2012. The deputy commissioner found claimant knew since at least February 25, 2009, that his work for defendant-employer was causing him to experience significant lower back problems. The deputy commissioner found that under the discovery rule, the manifestation date for claimant's work-related cumulative trauma injury is March 3, 2011, because claimant knew, or should have known, the nature, seriousness and probable compensable character of his injury no later than March 3, 2011. The deputy commissioner found defendants failed to carry their burden of proof to establish a 90-day notice defense pursuant to Iowa Code section 85.23. The deputy commissioner found defendants did carry their burden of proof to establish a two-year statute of limitations defense pursuant to Iowa Code section 85.26(1) because the manifestation date for claimant's injury was March 3, 2011, defendants paid no weekly benefits, and because claimant did not file his original notice and petition until April 2,

2013. Because the deputy commissioner found this claim to be barred by the Iowa Code section 85.26(1) two-year statute of limitations, claimant was awarded nothing The deputy commissioner ordered each party to be responsible for their own costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding defendants carried their burden of proof to establish a two-year statute of limitations defense pursuant to Iowa Code section 85.26(1). Claimant asserts the deputy commissioner erred in failing to award healing period benefits and in failing to award industrial disability benefits. Claimant asserts the deputy commissioner erred in failing to award payment of causally-related medical expenses and in failing to award alternate medical care. Claimant also asserts the deputy commissioner erred in failing to award claimant reimbursement for the cost of an independent medical evaluation (IME) by Farid Manshadi, M.D., and in failing to award claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on January 29, 2015, which relate to the following issues:

I affirm the deputy commissioner's finding that the correct injury date for claimant's work-related cumulative trauma injury is February 25, 2009, rather than the alleged injury date of August 22, 2012. I affirm the deputy commissioner's finding that defendants did carry their burden of proof to establish a two-year statute of limitations defense pursuant to Iowa Code section 85.26(1) because I find the manifestation date under the discovery rule for claimant's injury was February 21, 2011, defendants paid no weekly benefits, and because claimant did not file his original notice and petition until April 2, 2013. I affirm the deputy commissioner's finding that claimant is not entitled to healing period benefits and industrial disability benefits. I affirm the deputy commissioner's finding that claimant is not entitled to payment of medical expenses. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care. I affirm the deputy commissioner's finding that claimant is not entitled to reimbursement for the cost of Dr. Manshadi's IME. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I modify the deputy commissioner's finding that under the discovery rule the manifestation date for claimant's work-related cumulative trauma injury is March 3, 2011. I find that the under the discovery rule, the correct manifestation date for

claimant's work-related cumulative trauma injury is February 21, 2011, because claimant knew, or should have known, the nature, seriousness and probable compensable character of his injury no later than February 21, 2011. I provide the following analysis:

ISSUES ON APPEAL

1. Did the deputy commissioner err in finding defendants carried their burden of proof to establish a two-year statute of limitations defense pursuant to Iowa Code section 85.26(1)?

2. Did the deputy commissioner err in failing to award healing period benefits and in failing to award industrial disability benefits?

3. Did the deputy commissioner err in failing to award payment of causally-related medical expenses and in failing to award alternate medical care?

4. Did the deputy commissioner err in failing to award claimant reimbursement for the cost of Dr. Manshadi's IME and in failing to award claimant's costs of the arbitration proceeding?

FINDINGS OF FACT

Claimant was 57 years old at the time of the arbitration hearing (Transcript page 18) He graduated from high school in 1975 (Tr. p. 19) His employment history includes working in a packing plant, selling cars, working for a construction company and working for Donnelly (Tr. p. 20)

Claimant started working for Donnelly in 1984. (Tr. p. 20) He primarily worked as a printing press operator until October 2011 when he was moved back to packaging and handling. (Tr. pp. 22-23, 41) The press operator job required him to work on a raised platform. He would either work at chest height or he would stand on the platform and bend over the machine. Claimant agreed that the job descriptions in evidence were generally accurate as to the type of work and the exertional requirements of the positions he held with Donnelly. (Tr. p. 23; Exhibit 2, p. 1) The press operator job required claimant to regularly lift 50 pounds and occasionally lift over 100 pounds. Claimant also testified the press operator job required frequent bending, twisting and reaching. (Tr. pp. 23-24)

Claimant also was a farmer while he worked at Donnelly. He stated he rents approximately 450 acres in his farming operation, which he plants with corn and soybeans. (Tr. p. 28) Since his father passed away, claimant has done almost all of the ground preparation and planting. If his sons have time to help, they do so. (Tr. p. 29) Claimant runs the combine to do the harvesting, which takes about two weeks, depending on the weather. (Tr. pp 30-31) Planting includes dumping bags of seed into

the planter. Claimant testified the most weight he generally lifts while farming is the bags of seed corn which weigh about 39 pounds. (Tr. pp. 31-33) Harvesting includes running the combine and small repairs if needed. (Tr. p. 34) At the time of the hearing claimant also occasionally was paid to drive a commercial dump truck owned by his mother. (Tr. p. 65)

Claimant stated he would experience pains in his back down into his hips and legs while performing his job at Donnelly. (Tr. pp. 26-27) Claimant stated his back got worse over the years. (Tr. p. 27) Claimant saw his family doctor, Jeffrey Nasstrom, D.O., for his pain. Dr. Nasstrom referred claimant to the Mayo Clinic in 1999. (Tr. p. 27)

Claimant stated that when he first experienced back pain he did not report to Donnelly that he thought it was a work injury. When asked why not he replied, "I didn't know there was such a thing as cumulative damage or --." (Tr. p. 27)

Claimant stated he treated for his back problems for a number of years and, during that time, there have been some work restrictions imposed by various doctors who cautioned him to only lift as he was able. (Tr. p. 36) Claimant stated that over the years he has had physical therapy, spinal injections at the Mayo Clinic, and a number of medications. (Tr. p. 38) Claimant's first injection was in 2005. (Tr. p. 71) Claimant has discussed the possibility of surgery on his back at the Mayo Clinic, but he stated he was advised he should consider waiting five years or so for surgical techniques to improve. (Tr. p. 40; Ex. 8, p. 13) Claimant acknowledged that in 2009, the Mayo Clinic recommended restrictions of lifting no more than 30 pounds and to avoid twisting, bending, and stooping activities. (Tr. p. 73) Claimant stated he had work restrictions off and on from 2010 until he was terminated in late 2012 and, during that time, he was told by his doctors to take it easy. (Tr. p. 74) Claimant stated that when he was a press operator he was progressively off work more and more. (Tr. p. 76)

Claimant worked the press operator position until October 2011, when Donnelly transferred him to the package handling job, with a five dollar an hour pay cut. (Tr. pp. 22-23, 41) The job description for the press operator position required frequent crouching, twisting and bending as well as regularly lifting up to 50 pounds and occasionally lifting over 100 pounds. (Ex. 2, p. 1) The package handling job required continuous bending/stooping and squatting with frequent lifting up to 34 pounds and occasional lifting up to 74 pounds. (Ex. 2, p. 9)

Claimant stated he was told in October 2011 that because he could not perform all of the required duties of a press operator, it was not cost-feasible for Donnelly for him to remain in that position with his restrictions. (Tr. pp. 41, 42) Claimant then worked in package and handling until August 22, 2012. (Tr. p. 42) Claimant apparently did not work at Donnelly after August 22, 2012. (Tr. p. 42) Claimant stated he was formally terminated by Donnelly in late 2012, because he received permanent restrictions at that time and he was told those permanent restrictions could not be accommodated. (Tr. p.

43) Claimant stated he has not looked for work after his termination from Donnelly. (Tr. p. 67)

When claimant was off work for his back condition over the years before his termination in August 2012, he received short-term disability benefits, not workers' compensation benefits. (Tr. p. 59) Claimant testified Donnelly knew his work tasks aggravated his back. (Tr. p. 60) Claimant was asked and responded to questions at hearing concerning his condition:

> Q. And was it your understanding in your mind though that you felt the back problems during that time frame was related to the work activities at R.R. Donnelley?
>
> A. Yeah, they could directly relate them to that on the activities I did.
>
> Q. And that would have been 2009, 2010, 2011 when you're working on the press –
>
> A. Yes.

(Tr. p. 60)

I find that based on the above-quoted exchange, Claimant knew at least by 2009 that his work was aggravating his back condition.

Claimant has received both short and long-term disability benefits from Donnelly. At the time of the hearing he was receiving long-term disability. (Tr. p. 44) The record shows claimant received short-term disability for more than 100 days in 2009. (Ex. 1, p. 2) He received short-term disability for more than125 days in 2012. (Ex. 1, p. 5) Claimant stated that at the time of the arbitration hearing he had no future doctor appointments scheduled for his back because he was told there was nothing that could be done. (Tr. p. 44)

Claimant stated he experiences a nagging pain in his back all the time. If he does the "wrong activities" the pain spreads across his back and he has a shooting pain. (Tr. p. 45) Claimant stated he limits bending at the waist, due to his back. He stated he no longer has horses, although he still rides a motorcycle. (Tr. p. 46) Claimant stated his adult son and friends assist him with lifting or other tasks. (Tr. pp. 46-47)

Claimant described his farming activities as rather limited. He stated he plants for a short time in the spring and harvests in the fall, with the harvest taking more time. (Tr. pp. 30-31) He stated he does not do much physical labor while farming, primarily driving a tractor and filling the planter. (Tr. p. 31) He stated the seed bags are the heaviest things he lifts while farming and they weigh less than 40 pounds. (Tr. pp. 31-

33) He stated he has help from relatives with the seed bags as a general rule. (Tr. p. 31)

The exhibits document the following temporary restrictions for claimant's back condition:

Date	Restriction	Exhibit
10/14/2003	No work for 1 week and light duty for 2 weeks.	Ex. 5, p. 2 – Dr. Haganman
6/21/2006	Return to work 4-hr. shifts, increasing 2 hrs. every five days until reaching 8-hr. shifts.	Ex. 4, p. 6 – Dr. Shelerud
7/18/2006	Called to obtain work restrictions.	Ex. 4, p. 10 – Dr. Shelerud
11/14/2007	Restricted from work 11/14/2007 until 1/17/2008.	Ex. 9, p. 6 – Dr. Haganman
2/25/2009	Off work.	Ex. 4, p. 11 – Dr. Shelerud
4/23/2009	Return to work. 4-hr. shift x 2 weeks, 6-hr. shift x 2 weeks, full time light duty 30# lift restrict. Avoid twisting, turning, bending, stooping.	Ex. 1, p. 8 – Dr. Shelerud
5/14/2009	Avoid lifting, twisting forward bending 2 ½ weeks.	Ex 1, p. 9 – Chris Lutz, PT – per Dr. Shelerud
6/4/2009	Return to work with 30# lifting limit. Limit twisting to rarely.	Ex. 1, p. 10 – Chris Lutz, PT – per Dr. Shelerud
7/29/2009	Doctor recommends 2 weeks off work. Claimant asks for and receives 1 month off.	Ex. 5, p. 15 – Dr. Haganman

8/26/2009	25# lifting limit and limit twisting.	Ex. 1, p. 11 – Dr. Nasstrom
11/2/2009	Excused from work.	Ex. 6, p. 4 – Dr. Nasstrom
11/9/2009	Return to work 25# lifting limit and limit twisting.	Ex. 1, p. 12 – Dr. Nasstrom
12/16/2009	Excused from work.	Ex. 1, p. 13 – Marc Waitek PA-C
12/17/2009	Unable to work 12/16/09 12/21/09.	Ex. 1, p. 14 – Marc Waitek PA-C
7/21/2010	Limit lifting to 65#. No twisting/bending x 6 months.	Ex. 1, p. 15 – Dr. Nasstrom
8/12/2010	Limit twisting/bending. No straight lifting greater than 65# x 6 months.	Ex. 1, p. 16 – Dr. Nasstrom
1/12/2011	Limit twisting due to chronic low back pain. Can lift up to 55#.	Ex. 1, p. 18 – Dr. Nasstrom
2/10/2011	Limit twisting/bending. No straight lifting more than 65# x 6 months.	Ex. 1, p. 19 : Ex. 6, p.9 – Dr. Nasstrom
2/21/2011	Excused from work 2/20/2011 - 2/23/2011.	Ex. 1, p. 20 – Dr. Nasstrom
2/23/2011	Excused from work 2/23/2011 – 2/25/2011.	Ex. 1, p. 21 – Dr. Nasstrom
4/2/2011	**Two years from date of petition in arbitration was filed.**	**Statute of limitations date.**
11/8/2011	Limit lifting less than 35#. No repetitive bending	Ex. 1, p. 22 – Dr. Nasstrom
2/27/2012	Excused from work until 3/7/2012.	Ex.1, p. 23 – Dr. Nasstrom

3/6/2012	Ok for seated work x 1 week	Ex. 1, p. 24 – Dr. Nasstrom
3/9/2012	Unable to work. Will re-evaluate in 2 weeks.	Ex. 1, p. 32 – Dr. Gerdts
3/23/2012	Unable to work. Will re-evaluate in 2 weeks.	Ex. 1, p. 31 – Dr. Gerdts
4/6/2012	Unable to work for two weeks – will re-evaluate at that time	Ex. 1, p. 30 – Dr. Gerdts
4/17/2012	Limit twisting, bending. No lifting greater than 60# x 6 months.	Ex. 1, p. 25 – Dr. Nasstrom
4/20/2012	Unable to work. Will re-evaluated in 2 weeks.	Ex. 1, p. 29 – Dr. Gerdts
5/4/2012	Unable to work. Will re-evaluate in 2 weeks.	Ex. 1, p. 28 – Dr. Gerdts
5/18/2012	Unable to work. Will re-evaluate in 2 weeks	Ex. 1, p. 26 – Dr. Gerdts
6/1/2012	Will have MRI next week. Not able to return to work until results of MRI	Ex. 1, p. 27 – Dr. Gerdts
7/10/2012	Limited bending and lifting x 3 months.	Ex. 1, p. 34 – Dr. Nasstrom
8/1/2012	Lifting less than 25# and bending 5 – 10 times a day with limited rotation.	Ex. 6, p. 22 – Dr. Nasstrom
11/20/2012	**Permanent restrictions**. Rare twist, bend and squat. Rarely lift 40#. Occasionally 30# and frequently 20#.	Ex. 1, p. 37 – Dr. Brault
4/2/2013	**Petition in arbitration filed.**	Original notice in file

On December 13, 1999, claimant was evaluated at the Mayo Clinic in the Department of Orthopedic Surgery by Mark Dekutoski, M.D., for low back pain. The note for this visit states claimant was involved in very heavy lifting at work, but he could not recall a specific work-related injury. (Ex, 4, p. 1) Dr. Dekutoski's impression was, "His x-rays of 5-10-97 and 11-19-99, demonstrate Grade II spondylolisthesis, L4 on 5 with progression of disk collapse by several mm over this interval, but no progression of listhesis. There is the bilateral pars defects demonstrated on the 11–22–99, MR." (Ex. 4, p. 2) Dr. Dekutoski recommended weight reduction and he recommended that claimant not have surgery. (Id.)

On April 27, 2006, Randy Shelerud, M.D., in the Spine Center at the Mayo Clinic evaluated claimant for a pinched nerve. Dr. Shelerud noted there was no specific work-related injury. (Ex. 4, p. 3) However, Dr. Shelerud noted Claimant had "activity and work-limited back pain." Dr. Shelerud recommended bilateral L4-5 facet injections and lumbar stabilization exercises. (Ex. 4, p. 4)

When Dr. Shelerud re-evaluated claimant on July 14, 2006, Dr. Shelerud's diagnoses were:

- Activity and work-limited back pain
- Spondylolisthesis L4 on 5 that may be contributing to symptoms
- Predominantly axial symptoms with no true radicular problem
- Some radiation of pain down into the lateral thighs, question referred musculoskeletal pain versus other
- Marked obesity (high school weight 185, current weight 300)
- History of significant sleep dysfunction secondary to reflux esophagitis

(Ex. 4, p. 9)

Apparently the next time Dr. Shelerud evaluated claimant was on February 25, 2009. Dr. Shelerud's impressions at that time were:

DIAGNOSES

1. 51-year-old gentleman with chronic and disabling mechanical back, bilateral buttock pain with extension into the legs in an L5 distribution

2. Spondylolisthesis grade II, L4 on L5 with previous improvement using pars interarticularis injections

3. History of progressively more disabling symptoms with an interest in potential surgical solution

4. Above ideal body weight

5. Hyperlipidemia

6. Esophageal reflux

(Ex. 4, p. 12)

I affirm the deputy commissioner's finding that this date, February 25, 2009, is the correct date of claimant's work-related injury because claimant was diagnosed on that date with "chronic and disabling mechanical back, and bilateral buttock pain with extension into the legs in an L5 distribution" and because claimant was referred for a surgical consultation at that time. (Id.)

Bradford Currier, M.D., orthopedic surgeon in the Spine Center at the Mayo Clinic evaluated claimant on April 10, 2009, for possible surgery. Dr. Currier did not believe claimant needed surgery at that time. Dr. Currier increased the dosage of claimant's gabapentin and he recommended good aerobic exercise with an aggressive weight loss program. Dr. Currier also felt another trial of injections would be reasonable in the future to try to accelerate claimant's weight loss program. (Ex. 4, pp. 15-16)

On February 10, 2011, Jeffrey Nasstrom, D.O., claimant's family physician at the Mitchell County Regional Health Center in Osage, Iowa, re-evaluated claimant and provided new restrictions for claimant for the next six months, which consisted of limited twisting and bending and no straight lifting greater than 65 pounds. (Ex. 1, p. 19 and Ex. 6, p. 9)

Claimant returned to Dr. Nasstrom on February 21, 2011, who noted the following, in pertinent part:

S: Mr. Myers is here for increasing low back pain. Patient notes it does not seem to be shooting down the leg but does go over the left hip. Denies any bowel or bladder problems. He is just increasingly frustrated. He has not had any falls or injuries

. . .

A: Progressive back pain.

P. 1. We will make an appointment with Rochester for him to follow up.

2. Medrol Dosepak.

3. We will await his appointment in Rochester. He has seen Dr. Shelerud in the past. He was wondering about Dr. Brault. We will arrange for this.

(Ex. 6, p. 10)

Based on the history taken from claimant on February 21, 2011, and based on his evaluation of claimant on that date, Dr. Nasstrom wrote a letter dated March 3, 2011, to Jeffrey Brault, D.O., in the Spine Center at the Mayo Clinic. Dr. Nasstrom's letter to Dr. Brault states the following, in pertinent part:

> . . . Mr. Myers recently was in for increasing low back pain. He has been getting along fairly well. We have been giving him work restrictions, and he has been allowed to drive a fork lift which seems to be much better. Overall, he has been improving. We had him on phentermine intermittently to help with his weight. He had been down to 250 pounds and really getting along quite well in September. His most recent weight in February was 263. Unfortunately, he has been developing increasing back pain with radicular symptoms. He notes it has been increasingly intolerable to work at this time. I did ask him to followup with you for a discussion of further treatment options. We have tried nonsteroidals and a Medrol Dosepak without improvement.

(Ex. 6, p. 15)

On March 15, 2011 Dr. Brault evaluated claimant and noted claimant was experiencing increasing falls. (Ex. 4, p. 21) Dr. Brault's impressions were:

DIAGNOSES

1. Spondylolisthesis grade 2 L4 on L5

2. Progressive disability with increasing falls

3. Hyperlipidemia.

(Ex. 4, pp. 21-22; Ex. A, p. 13)

Dr. Brault noted claimant had exhausted most conservative measures. Dr. Brault recommended re-evaluation by Dr. Currier.

Claimant apparently did not return to Dr. Currier after Dr. Brault's March 15, 2011, evaluation. Claimant did return to Dr. Brault 19 months later on October 22, 2012, and Dr. Brault again recommended that claimant be re-evaluated by Dr. Currier.

Dr. Currier re-evaluated claimant on November 15, 2012, for his back and lower extremity pain. Dr. Currier noted claimant had been on light duty for a couple of years, but he had since been moved to package and handling and presently there was no light duty work available at Donnelly. (Ex. 4, p. 26) Dr. Currier did not believe surgery was mandatory or urgent at that time. (Ex. 4, p. 27) Dr. Currier noted the following, in pertinent part:

> . . . It has been six years since his last set of injections. I encouraged him to continue to work on weight loss, to work on core stabilization, and we could consider another set of injections to identify the pain generator and see if he could continue to get by without surgery. If the pain generator is clearly identified on the basis of injections, then we could entertain a fusion plus/minus decompression, but again, the predictability of that will be uncertain given the widespread degenerative disease above that level. If he comes to a fusion, he will need a flat back series done to assess his overall spine alignment. I will correspond with Dr. Brault to let him know my thoughts and see if he would be interested in setting Mr. Myers up to have some injections.

(Ex. 4, p. 27)

Dr. Brault re-evaluated claimant on November 20, 2012. Dr. Brault noted the following, in pertinent part:

> IMPRESSION/REPORT/PLAN
>
> Mr. Myers returns after being seen by Dr. Currier as well as having a repeat EMG that demonstrated chronic, inactive left S1 radiculopathy. MRI showed the grade 2 spondylolisthesis of L4 on L5 which is stable compared to February 19, 2009.
>
> IMPRESSION
>
> #1 Spondylolisthesis
>
> #2 Degenerative disk at L4-L5
>
> #3 Facetogenic low back pain.
>
> PLAN
>
> 1. As per Dr. Currier's recommendations, we will proceed with CT-guided bilateral 4-5 5-S1 facet injections

2. I would also like to initiate a trial of Neurontin starting off at 300 mg q.h.s and escalating up to 600 t.i.d.

3. We will have him continue to work on weight loss and core strengthening.

4. I did write him a work release not to lift more than 40 pounds, no repetitive bending, lifting, twisting. I will make these restrictions permanent. I will follow up with him via phone three weeks after the injection.

(Ex. 4, p. 28)

It was upon receipt of Dr. Brault's permanent restrictions that Donnelly officially terminated claimant's employment. (Tr. p. 43)

On May 12, 2014, Dr. Brault responded to a letter from claimant's counsel. Dr. Brault agreed that claimant's diagnosis was spondylolisthesis, Grade 2 L4 on L5 with lateral foraminal stenosis. He agreed the cause of claimant's degenerative arthritis is multifactorial and that claimant's years of heavy and repetitive work were an aggravating factor and probably were a contributing factor to his back pathology. (Ex. 4, p. 30)

On March 12, 2014, Dr. Brault responded to questions submitted by defendants' counsel. Dr. Brault acknowledged that claimant denied any specific injury when he first saw claimant in March 2011 and that claimant's back discomfort was progressing at that time. Dr. Brault also said claimant's condition is degenerative, and he anticipated episodic exacerbations. Dr. Brault also stated he was hopeful that with a fairly stringent exercise program, claimant would be able to alleviate some of his symptomatology. (Ex. A, pp. 28-29)

Claimant has also been treated for his low back condition by a number of health practitioners at The Mitchell County Regional Health Center in Osage, Iowa. On November 13, 2007, Mark Haganman, D.O., noted claimant had work-limiting back pain. (Ex. 5, p. 13) On July 29, 2009, Dr. Haganman provided claimant with a work excuse to be off two weeks. At claimant's request, Dr. Haganman increased the time to one month. (Ex. 5, p. 15) On August 26, 2009, Dr. Nasstrom diagnosed claimant with chronic disabling mechanical back pain with radicular symptoms and provided a 25-pound lifting restriction for a month. (Ex. 6, p. 3)

I find the medical evidence discussed above establishes claimant knew since at least 2009, if not sooner, that his work was causing significant back problems. In fact, claimant testified to that effect during the hearing. (Tr. p. 60) He also testified Donnelly knew in 2009 his work was aggravating his condition. (Id.) Obviously, if claimant was aware in 2009 that Donnelly knew at that time that his work was causing significant

back problems, one must also conclude claimant also knew it. On February 21, 2011, Dr. Nasstrom evaluated claimant and then Dr. Nasstrom wrote his March 3, 2011, letter to Dr. Brault. In that letter, Dr. Nasstrom noted claimant had been developing increasing low back pain and claimant told him work was intolerable at that time. (Ex. 6, p. 15) Based on that information, I modify the deputy commissioner's finding that March 3, 2011, is the manifestation date under the discovery rule for claimant's work injury. I find the correct manifestation date to be February 21, 2011, the date Dr. Nasstrom actually evaluated claimant and took a history from claimant, not March 3, 2011, the date of Dr. Nasstrom's letter to Dr. Brault. Based on the following factors:

1. Dr. Nasstrom's evaluation of claimant on February 21, 2011;

2. The history Dr. Nasstrom took from claimant on February 21, 2011;

3. The extensive medical treatment claimant received from multiple providers from June 2006 through February 2011, which included multiple and lengthy periods of work restrictions, and

4. Because claimant received substantial amounts of short-term disability benefits during 2009,

I find claimant knew, or should have known, the nature, seriousness and probable compensable character of his work-related injury no later than February 21, 2011.

On September 14, 2012, Dr. Nasstrom agreed with a letter prepared by claimant's counsel that the job requirements of press operator and paper handler were contributing factors for claimant's back pain. (Ex. 6, p. 29) However, as discussed above at page 5, and below at pages 17 and 18. this was something claimant already had known since 2009. On May 13, 2014, Dr. Nasstrom responded to a letter from defendants' counsel. Dr. Nasstrom agreed claimant had no specific single injury, claimant has had a longstanding arthritic/degenerative condition of the lumbar spine, and claimant will continue to have intermittent flare-ups. (Ex. E, pp. 3, 4)

Farid Manshadi, M.D. performed an IME of claimant on November 20, 2013. (Ex. 9, pp. 14 – 18) In his report, Dr. Manshadi noted the following in pertinent part:

> DISCUSSION: Mr. Dave Myers' diagnosis for his low back pain is chronic low back pain related to a significant lumbar spine degenerative arthritis as well as a Grade II spondylolisthesis at L4-L5, as well as neural foraminal stenosis at the L4-L5 being severe on the left and moderate on the right. Also chronic left S1 radiculopathy, at least by EMG and clinically by having some weakness involving the L5-S1 myotomes as well as some atrophy of the left calf muscles. I believe Mr. Myers' work at RR Donnelly has caused significant aggravation of his back problems. It is well documented in the records that Mr. Myers' job was fairly physical and

> laborious while he was working at RR Donnelly. In fact, on several occasions he was put on restrictions from his work to allow him to recover and reduce the flare-up of his back condition. Interestingly, every time after conservative treatments Mr. Myers was able to return to work. However, he again was taken off work after a short while due to aggravation of his back. He has been seen on several occasions at Mayo Clinic and again it is well documented that his work activities have aggravated his back problems.

(Ex. 9, p. 17)

Dr. Manshadi noted claimant was put on restrictions a number of times, which would allow him to recover; however, he would then aggravate his back. (Ex. 9, p. 17) Dr. Manshadi found claimant to be at maximum medical improvement as of November 27, 2012, and he provided claimant with a 12 percent impairment rating for his back condition. Dr. Manshadi adopted Dr. Brault's restrictions of rare twisting, turning, squatting and kneeling, with rare lift/carry/push/pull up to 40 pounds, occasional reaching above shoulder level with occasional lift/carry/push/pull up to 30 pounds and frequent lift/carry/push/pull up to 20 pounds. (Ex. 9, p. 18)

On January 7, 2014, Scott Neff, D.O. performed an IME of claimant. (Ex. B, pp. 1 – 7) Dr. Neff noted the following, in pertinent part:

> Based on my review of the records provided, taking a detailed history from this gentleman, and performing a physical examination, it is my opinion that he has significant degenerative disk disease in his lumbar spine combined with spondylolisthesis, grade II, of L4 on L5. This circumstance has been undergoing its natural, degenerative progression over time. He has not had a work-related injury. His overall degenerative circumstance has been contributed to by aging, genetic predisposition, and chronic significant obesity. There has been no specific substantial contribution from his press operative work activity.
>
> . . . .
>
> This pleasant gentleman, in my opinion, has an unfortunate set of circumstances, which has not been caused, aggravated, accelerated, or lightened up by the specific work activity as described. This situation has been contributed to by aging, genetic predisposition, and significant obesity. He does have pathology in the spine and if he is able to work for his dad or do less strenuous activity, this would certainly be a reasonable option. Most physicians faced with a patient with this type of pathology, would recommend certain restrictions. These restrictions would be recommended as a result of his overall degenerative disk disease and

> degenerative circumstance, and not as a result of any specific work injury or work-related circumstance.

(Ex. B, p. 6)

In light of all of the other medical evidence in this matter, I find Dr. Neff's opinions to be entirely unconvincing.

CONCLUSIONS OF LAW

In this case, at hearing defendants asserted both a 90-day notice defense under Iowa Code Section 85.23 and a two-year statute of limitations defense under Iowa Code Section 85.26(1). The deputy commissioner found defendants failed to prove the notice defense. The deputy commissioner did find defendants carried their burden of proof regarding the two-year statute of limitations defense.

Because defendants did not file a cross-appeal in this case, the 90-day notice defense has been waived as an appeal issue and it will not be addressed in this appeal decision. However, claimant did appeal the deputy commissioner's finding that defendants carried their burden of proof with regard to the two-year statute of limitations defense.

Iowa Code section 85.26(1) states:

> An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

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

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

The time period both for giving notice and filing a claim does not begin to run until the claimant as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Claimant's realization that the injurious condition will have a permanent adverse impact on employability is sufficient to meet the serious requirement. Positive medical information is unnecessary if information from any source gives notice of the condition's probable compensability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

The Iowa Supreme Court has summarized the interplay of the "manifestation" of a cumulative injury and the discovery rule: To summarize, a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred. Nonetheless, by virtue of the discovery rule, the statute of limitations will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability, i.e., the claimant knows or should know the "nature, seriousness, and probable compensable character" of his injury or condition. Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001) (quoting Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980)). Herrera addressed the two-year statute of limitations under section 85.26, but the Iowa Supreme Court has stated "[t]his rule is applicable to the notice of claim provision in section 85.23." Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980).

I previously affirmed the deputy commissioner's finding that claimant's correct injury date in this matter is February 25, 2009. I also previously found that the manifestation date for claimant's injury under the discovery rule is February 21, 2011. Claimant's petition was filed on April 2, 2013, which is more than two years after February 21, 2011.

Claimant was informed he had a chronic condition in his back as of February 2009. (Ex. 4, p. 12) He testified at hearing that he knew at that time his condition was related to his work:

> Q. And was it your understanding in your mind though that you felt the back problems during that time frame was related to the work activities at R.R. Donnelley?
>
> A. Yeah, they could directly relate them to that on the activities I did.

Q. And that would have been 2009, 2010, 2011 when you're working on the press –

A. Yes.

(Tr. p. 60, lines 14-22)

Claimant argues in his appeal reply brief that his testimony quoted above does not establish he was actually aware in 2009, 2010 and 2011, that his back condition was caused, at least in part, by his employment. In his appeal reply brief, claimant states the following, in pertinent part:

> Defendants point to Dave's answer as proof that Dave believed his back problems were work-related as early as 2009. However, what Dave was speaking to was that his doctors ("they") had eventually related his back problems to his work activities, not that he himself felt his back problems were work-related as early as 2009. Defendants' assertions that Dave thought his back pain was work-related as early as 2009 are disingenuous and contrary to the plain language of Dave's testimony at hearing.

(Claimant's appeal reply brief at pp. 2-3)

I disagree. I find that the most reasonable interpretation of the above-quoted exchange from the hearing transcript is that claimant was asked if he was aware in 2009, 2010 and 2011 that his back condition was related to his employment at Donnelly and claimant responded that he was aware in 2009, 2010 and 2011 that his back condition was related to his employment at Donnelly. Furthermore, a few sentences earlier, the following exchange took place:

Q. And as you testified earlier to the Judge, you'd never reported to R.R. Donnelly that you were claiming a work injury to your back during that period of time [2009 through 2011]; correct?

A. They knew I was off because of my back but - - and they knew that my tasks at work aggravated my back but - -

Q. Did you ever report to them that "Hey, I'm claiming a work comp injury because of something I did at work"?

A. I never claimed a work comp injury.

(Tr. p. 60, lines 3-13)

Obviously, if claimant was aware in 2009 that Donnelly knew at that time his work was causing significant back problems, one can only conclude claimant also knew it.

Claimant received short-term disability benefits for an extensive period in 2009. He also had extended periods of restrictions. While there were time periods he was able to work, the medical evidence clearly shows his back condition was not going to get better. I affirm the deputy commissioner's finding that claimant knew by early 2009 he had a chronic back condition which was related to his employment at Donnelly. (Ex. 4, pp.11-14) Claimant admitted at hearing he knew in 2009, 2010, and 2011 he had a work-related back condition. (Tr. p. 60) As stated above, I find that based on the history claimant gave Dr. Nasstrom on February 21, 2011, claimant either knew, or as a reasonable person he should have known, the nature, seriousness, and probable compensable character of his injury or condition no later than February 21, 2011.

Pursuant to Iowa Code section 85.26(1), because the manifestation date for claimant's work-related injury is February 21, 2011, because defendants never paid any weekly benefits and because claimant did not file his original notice and petition until April 2, 2013, defendants have shown by a preponderance of the evidence that claimant failed to timely file his claim. As such, this claim is time-barred by Iowa Code section 85.26(1) and claimant is not entitled to workers' compensation benefits for this claim.

Claimant submitted medical costs at hearing in the amount of $15,055.38 for his medical treatment. (Ex. 12, p. 1) Claimant also requested medical mileage in the amount of $723.61. (Ex. 13, p. 1) Because claimant's claim is time-barred by Iowa Code section 85.26(1), claimant is not entitled to payment of those items.

Claimant also requested costs of $1,736.46. Of those costs, $1,200.00 is for Dr. Manshadi's IME. (Ex.14, p. 1) An IME may be reimbursed even in a case where claimant has not prevailed. However, in this case, claimant has not shown that defendants retained a physician to provide an impairment rating before Dr. Manshadi's IME took place. Under Iowa Code section 85.39, such a showing is required before an award of IME expenses can be made. DART v. Young, 867 N.W.2d 839 at 844-847 (Iowa 2015) Therefore, claimant is not entitled to reimbursement for the cost of Dr. Manshadi's IME.

As claimant did not prevail on the merits of his claim I affirm the deputy commissioner's determination not to award claimant any other requested costs.

As defendants have proven the affirmative defense under Iowa Code section 85.26(1), all other disputed issues in this case are moot.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of January 29, 2015, is MODIFIED as follows:

The correct injury date in this matter for claimant's work-related injury is found to be February 25, 2009.

The manifestation date under the discovery rule for claimant's work-related injury in this matter is found to be February 21, 2011.

Because claimant did not file his original notice and petition in this matter until April 2, 2013, claimant's claim is time-barred pursuant to Iowa Code section 85.26(1) and claimant shall take nothing in this matter.

Pursuant to rule 876 IAC 4.33, each party is responsible for their own costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 18th day of July, 2016.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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