

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL FELLER,

Claimant,

vs.

BUNGE CORPORATION,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

NOV 28 2018

WORKERS COMPENSATION

File No. 5047545

ARBITRATION DECISION

Head Note Nos.: 1402.30, 1803, 2203

STATEMENT OF THE CASE

Daniel Feller, claimant, filed a petition in arbitration seeking workers' compensation benefits from Bunge Corporation (Bunge) and its insurer, Ace American Insurance Company as a result of an injury or disease he allegedly sustained on February 5, 2014 that allegedly arose out of and in the course of his employment. This case was heard in Council Bluffs, Iowa, and fully submitted on April 9, 2018. The evidence in this case consists of the testimony of claimant, Darcie Feller, Claimant's Exhibits 1 – 5, Defendants' Exhibits A, C – E and Joint Exhibits 1 - 6.

ISSUES

Whether claimant sustained an injury on February 5, 2014 which arose out of and in the course of employment;

Whether claimant sustained an occupational disease on February 5, 2014 which arose out of and in the course of employment;

The extent of claimant's disability;

Whether claimant's medical expenses are related to the alleged work injury/occupational disease of February 5, 2014; and

Assessment of costs.

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 agreed that if the injury is found to be compensable the defendants are liable for the bills related to the occupational asthma and vocal cord dysfunction. (Attachment to Hearing Report; Transcript, pages 6, 7)

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Daniel Feller, claimant was 48 years old at the time of the hearing. Claimant graduated from high school. He has no post-high school education and no vocational training. Claimant testified that he has generally been in good health except for his breathing and lungs. (Tr. p. 12) Claimant testified that prior to February 5, 2014 he did not have allergies or asthma. (Tr. 25) Claimant did receive treatment for bronchitis before the February 2014 work injury. (Tr. p. 63)

Claimant worked in a family business as a trucker when he left high school. He worked in that business for about 12 years. Claimant then worked for a short time as a route driver for Coca - Cola and as a yard man for about a year at Menards. (Tr. p. 15) Claimant worked for FedEx Freight from 2000 to 2005. (Exhibit C, p. 18; Ex. D, pp. 36 – 38)

Claimant started work for Bunge on August 22, 2005. (Tr. p. 27; Ex. D, p. 38) Bunge crushes soybeans to extract oil. Claimant was a lead operator in the shipping and receiving department. (Tr. p. 17) Soybeans would arrive by truck or rail at Bunge and then they would be run through a cleaning center and then put into grain dryers and then into holding tanks before being crushed. (Tr. p. 18) Claimant's standard two-week pay period would have him working 89 hours.

Claimant described both the shipping and receiving work at Bunge as very physical. Claimant would climb on rail cars, clean up spills and try to adjust equipment that broke. (Tr. p. 19) Claimant described exposure to dust while loading meal into rail cars. (Tr. p. 21) Claimant, when working loading rail cars, could be outside up to 12 hours, with a hut that he could go into. Claimant estimated he was outside about half time when working other positions at Bunge. (Tr. p. 22)

On February 5, 2015, claimant was working in the meal load-out building; a building that was open on two sides so the snow was coming into the building. (Tr. p. 26) Claimant was using a shovel and a skid loader to remove snow from the building. (Tr. p. 27) Claimant said that after working a couple of hours he started to feel ill and

could not catch his breath. (Tr. pp. 30, 31) An ambulance was called from work and took claimant to the emergency department at Jennie Edmonson Hospital. (Tr. p. 31) Claimant was on oxygen and was given medicines. He was not admitted to the regular hospital and was discharged and referred to his primary care physician. (Tr. p. 33)

Claimant started to have coughing and breathing symptoms about one day later and was admitted to the hospital for seven days. (Tr. p. 35). At this time, John Southard, M.D., Ph.D., started to provide care for claimant.

Claimant testified that he attempted to return for work in May at Bunge, but was unable to due to his coughing and was told to go home. (Tr. p. 37) Claimant was off work. Claimant was told by Bunge in July 2014 that it did not have a position for claimant. Claimant was terminated as of July 21, 2014. (Ex. D, p. 38) (Tr. p. 41) Claimant has not worked since his termination. At the time of the hearing claimant had been denied Social Security Disability benefits. (Tr. p. 60)

Claimant testified that defendants denied his claim in 2016 and stopped paying for medical treatment. Defendants informed claimant on July 20, 2016 that based upon the opinions of Gregory Hicklin, M.D., no additional medical care would be authorized. (Ex. 2, p. 1) Claimant said that Dr. Southard continued to provide treatment and claimant was uncertain how Dr. Southard was paid. Claimant received some prescription samples and his wife's insurance paid some cost for his care. (Tr. p. 48)

Claimant went to Arizona in January 2016 for a hunting trip. Claimant discussed this trip with Dr. Southard before he went. (Tr. p. 50) Claimant testified that he did not engage in hard physical activities while hunting and maintained his lung treatments. (Tr. pp. 51, 52) Claimant bow hunted in 2015 and 2016. (Tr. p. 76)

Claimant testified that he coughs all the time, the more he talks the worse his voice gets and claimant stated that he is short of breath and he gets fatigued very fast. (Tr. pp. 55, 56) Claimant has four nebulizer treatments a day. The treatments take about an hour to complete, including recovery time. (Tr. p. 57) Claimant needs a bronchoscopy about once a year. (Tr. p. 58) Claimant takes care of general household chores such as vacuuming, dusting and cleaning. (Ex, D, p. 45)

Claimant has not looked for work or applied for vocational services since his termination at Bunge. (Tr. p. 65) Claimant has a commercial driver's license (CDL), but his medical certification has expired. Claimant does not believe he can go back to work at Menards, FedEx or Bunge due to his lungs. (Ex. D, p.38) Due to coughing fits he does not believe it would be safe for him to drive a truck. (Tr. p. 84)

Darcie Feller, claimant's wife, testified at the hearing. Ms. Feller said that before the February 2014 incident claimant was able to perform manual labor and hunt all day long. (Tr. p. 86)

I find that claimant's gross income for the relevant time period before his injury was \$1,074.76. Claimant was married and entitled to three exemptions. Claimant's

weekly workers' compensation rate is \$684.58 based upon the rate book in effect at the time of his injury.

On February 5, 2014, claimant was in the emergency department of Jennie Edmonson Hospital and was diagnosed with chest pain and acute bronchitis. (Joint Ex. 1, p. 6)

On February 11, 2014, Jorge Alvarez, M.D., wrote

I am writing a letter regarding Mr. Daniel Feller, who has been admitted to the hospital for acute respiratory distress. He had several episodes of increasing respiratory difficulty after exposure to the cold air while working outdoors.

The patient required intensive inpatient therapy for this acute illness. He required hospitalization for at least 4 to 5 days' time period.

I am requesting the patient have limited outdoor exposure, especially with the cold air and wind due to his current illness. I appreciate your cooperation with Mr. Feller's healthcare.

(JEx. 2, p. 7) On March 1, 2014, Dr. Southard released claimant to return to work with restrictions of no exposure to cold air and dust. (JEx. 1, p. 9) Dr. Southard was asked questions concerning claimant's condition and causation of his condition by claimant's attorney. On March 20, 2014 Dr. Southard wrote,

1. My diagnosis of Mr. Feller's condition is hyperactive airways disease with acute bronchitis.

2. In my opinion, Mr. Feller's respiratory condition that resulted in his hospitalization was a direct result of exposure to a combination of cold air and grain dust at his workplace at Bunge Corporation.

(JEx. 2, p. 13) On March 26, 2014, claimant asked Dr. Southard if he could return to work. Dr. Southard could not recommend claimant return to grain dust. On April 24, 2014, Dr. Southard agreed that claimant could try a return to part-time work if he limited his exposure to irritants and extremes in temperature. (JEx. 2, pp. 15, 17)

On May 9, 2014, defendants asked Dr. Southard about claimant's condition. Dr. Southard's response was,

Based upon the patient history, medical records, examination, testing and treatment of Daniel Feller, I am unable to say within a reasonable degree of medical certainty that the respiratory issues he experienced in February and March 2014 were caused or materially aggravated by conditions associated with his work at Bunge.

Correct ✓ Incorrect

(JEx. 2, p. 18) In response to a letter from the HR Department at Bunge as to whether claimant could safely work at Bunge, Dr. Southard wrote on June 23, 2018 that claimant demonstrated an inability to work at Bunge. (JEx. 2, p. 24)

In response to a letter from claimant's attorney Dr. Southard wrote on September 27, 2014,

His history was positive for concomitant exposures to cold outside air and significant grain dust inhalation in his work environment at Bunge Corporation. The temporal relationship of those exposures to the onset of respiratory distress prompting hospitalization, and the clinical findings on examination resulted in an initial diagnosis of severe tracheobronchial inflammation and bronchospasm secondary to grain dust inhalation.

It is my opinion within a reasonable degree of medical certainty that the above outlined signs and symptoms were causally related to his exposure to and inhalation of grain dust at Bunge Corporation.

(JEx. 2, p. 29) Dr. Southard's working diagnosis was short-term respiratory distress and long-term respiratory impairment secondary to grain dust inhalation exposure while working at Bunge. Dr. Southard was unable to say if claimant was at maximum medical improvement at that time. (JEx. 2, p. 30)

On February 6, 2018, Dr. Southard wrote,

My final diagnosis is permanent obstructive and restrictive respiratory impairment causally related to grain dust exposure while working at Bunge Corporation. Such exposure is more prevalent in Mr. Feller's prior employment work environment than in everyday life and in most other occupations.

Mr. Feller's occupational lung dysfunction has rendered him incapacitated from performing his former employment duties at Bunge Corporation.

Using the AMA Guides Fifth Edition, Mr. Feller's permanent functional impairment related to his occupational exposure and consequent respiratory dysfunction is class III (26%-60%) of the whole person based on pulmonary function testing. Considering his constant cough and shortness of breath with ambulation, I would consider his clinical impairment to be at 50% for the whole person. Work restrictions including inhalational exposure to irritant chemicals, extremes of temperature, dust of all types, climbing, lifting, repetitive arm movements, and activities requiring ambulation at an accelerated pace.

(JEx. 2, p. 36)

On May 18, 2015, Dr. Hicklin examined claimant. Dr. Hicklin noted that claimant had been exposed to considerable dust at work. (Ex. A, p. 2) Dr. Hicklin said, "Mr. Feller presents with a very unclear history and diagnosis." (Ex. A, p. 5) Dr. Hicklin recommended additional testing including an ENT to look at vocal cord dysfunction syndrome, a GI evaluation to look at further treatment of reflux and possibly neurological evaluation of claimant's diaphragm. (Ex. A, p. 5) Dr. Hicklin concluded his evaluation,

I regret not being able to give a more definitive diagnosis, but this does not fit the typical case presentation of asthma, and I think there is something else going on. As far as the work place, certainly the dusty environment can be an irritant, the extremes in temperature going from cold to hot can trigger asthma. There was a triggering incident on 2/5/14, but I do not believe that his current situation is a result of his occupation.

(JEx. A, p. 5)

On May 5, 2016, Dr. Hicklin reviewed additional medical reports. Dr. Hicklin stated that,

It is my opinion, after reviewing the medical records, that Mr. Feller has a problem with his upper airway commonly called vocal cord dysfunction syndrome that is not related to his work. Furthermore, this is complicated by psychological factors and stress.

Exposure to irritants could temporarily make the vocal cord dysfunction worse, but I do not think it is the cause of his vocal cord dysfunction syndrome.

(Ex. A, p. 6)

On January 15, 2018, Dr. Hicklin wrote another letter. Dr. Hicklin continued his opinion that the claimant's condition was not work related. He also opined that the claimant had a bacterial lower respiratory infection in December 2017. (Ex. A, p. 7)

Dr. Hicklin was deposed on October 5, 2017. Dr. Hicklin reviewed additional medical reports and tests subsequent to his 2016 report. Dr. Hicklin opined that claimant's primary problems related to his vocal cord dysfunction syndrome with some psychological components. He did not believe that it was caused by the dust and cold exposure of February 5, 2014. (Ex. E, p. 53) He did not believe that there was an occupational cause for claimant's symptoms. (Ex. E, p. 56) Dr. Hicklin did comment that claimant's symptoms remain unabated since February 5, 2014. (Ex. E, p. 56)

On April 7, 2015, a functional capacity test (FCE) was performed by Erick Alveno, PT. Mr. Alveno noted,

Due to his severe and frequent coughing as he exerted himself during this FCE, this FCE was significantly modified.

(JEx. 3, p. 53) Mr. Alveno noted that while claimant had a right ankle dysfunction, (not part of this case), his main limiting factor was respiration. (JEx. 3, p. 53) His report stated,

I modified this FCE significantly due to concerns related to his Severe Obstructive Pulmonary Disease. As his activity level increased, he developed shortness of breath, breathing increased to over 20 respirations per minute, coughing increased, and his posture became increasingly flexed as he at time [sic] gasped. He braced himself by placing his hands onto a table, or other object to help engage his accessory muscles of respiration. At this time his face would become increasing [sic] red and splotchy.

(JEx. 3, p. 53) Mr. Alveno's recommendations were,

Per this FCE, his Severe Obstructive Pulmonary Disease was the main limiting factor throughout this FCE. It affected all of the assigned tasks during this FCE. I modified this FCE significantly due to safety concerns with his respiration. Although this client is able to perform tasks in the Sedentary work category as defined by the Dictionary of Occupational Titles, his SOPD will require him to rest or take frequent rest periods throughout a work day.

(JEx. 3, p. 54)

On May 11, 2016, Neal Wachholtz, PT performed an FCE. Mr. Wachholtz noted that claimant demonstrated frequent coughing during the testing, but did not significantly change his activity level. (JEx. 6, pp. 93, 94) Mr. Wachholtz found claimant could safely work in the MEDIUM-HEAVY category of work and deferred to Susanna Von Essen, M.D.'s recommendations in activity due to his pulmonary function. (JEx. 6, p. 95)

On August 10, 2016, Karen Stricklett, M.S., C.R.C., A.B.V.E.-D, issued an employability assessment of the claimant. (Ex. C, pp. 13 – 33) Ms. Stricklett noted claimant was earning \$1,289.00 per week at the time of his injury. Ms. Stricklett noted that Dr. Von Essen thought claimant could return to work and that claimant could lift up to 70 pounds occasionally and 35 pounds frequently. Ms. Stricklett relied upon Dr. Von Essen's limitations, including no exposure to grain dust, and the May 2016 functional capacity evaluation to conduct her employability assessment. (Ex. C, p. 21) Ms. Stricklett identified a number of positions in claimant's labor market she thought he could perform. She listed,

OCCUPATIONS	MEDIAN WEEKLY WAGE <u>Omaha, NE/Council Bluffs, IA</u>
Delivery Driver	\$579.20

Stock Room Operator	\$507.20
Order Filler/Packer	\$422.80
Forklift Operator	\$658.00
Production Helper	\$617.20
Tractor Trailer Truck Driver	\$724.40
Security Guard	\$512.80
Janitor/Custodian	\$444.00

(Ex. C. p. 22) She noted a starting wage rate from \$10.50 to \$15.00 for those positions.
(Ex. C, p. 22)

On January 22, 2018, Ms. Stricklett issued a supplemental report. Ms. Stricklett noted Dr. Von Essen had recommended an FCE that focused on the respiratory system, but that was not performed. (Ex. C, p. 27) Ms. Stricklett modified her opinion somewhat in that she noted that there were manufacturing and processing work environments that would not be suitable due to exposure to dust or fumes. (Ex. C, p. 27) Using additional restrictions provided by Dr. Southard, Ms. Stricklett eliminated tractor trailer driver, delivery driver and janitor from the available jobs claimant could perform. She opined there were still many positions claimant could perform in the Council Bluffs area. She stated claimant should be able to earn wages ranging from \$382.00 to \$683.00 per week. (Ex. C, p. 30)

Dr. Von Essen first treated claimant on July 26, 2015. In this appointment she noted claimant had no blood in his cough. (JEx. 4, p. 64) She noted in her assessment that claimant had a complex history and stated that claimant's symptoms were most consistent with irritant-induced asthma and vocal cord dysfunction. (JEx. 4, p. 65) On August 11, 2015, Jill Poole, M.D., diagnosed claimant with significant vocal cord dysfunction. (JEx. 4, p. 66) On April 29, 2016, Dr. Von Essen recommended a referral to National Jewish Health for a complete assessment of his respiratory status and possible treatment for his vocal cord dysfunction. Dr. Von Essen also expressed concern that claimant's coughing and resulting dizziness could result in a motor vehicle accident. (JEx. 4, p. 69)

On March 28, 2016, Dr. Von Essen wrote to defendants' counsel. Dr. Von Essen stated that she has done research on grain dust exposure related to her 30 year role in pulmonology with the University of Nebraska Medical Center. (JEx. 4, p. 70) She stated,

It is my opinion that the irritant induced asthma more likely than not was caused by Mr. Feller's exposure to grain dust at Bunge. He had no history of asthma before working there. Grain dust exposure is known to cause asthma that may or may not be allergic in nature.

(JEx. 4, p. 70) Dr. Von Essen disagreed with Dr. Hicklin on causation. She stated,

I disagree regarding the causation of the asthma as noted about [sic]. Asthma can become a chronic condition even though the causative exposure has ended. I agree that exposure to cold temperatures at work

does not explain current respiratory symptoms. Cold air can only be a temporary aggravating factor in my opinion. It is my opinion that the vocal cord dysfunction is a major contributor to his current situation. His most recent lung function test, on 7/24/15 showed completely normal values. Thus, when the vocal cord spasm (dysfunction) is under control, his lung function is excellent. In fact, it is normal.

(JEx. 4, p. 71) Dr. Von Essen stated that it was medically reasonable for claimant to return to work, but he should not be exposed to grain dust. (JEx. 4, p. 72) On June 13, 2016, Dr. Von Essen wrote claimant's counsel after reviewing a letter of Dr. Hicklin. She stated,

I agree with Dr. Hicklin's statement that Mr. Feller has vocal cord dysfunction. Mr. Feller also has occupational asthma and Dr. Hicklin does not mention that diagnosis in his letter. I also disagree that it is not related to his work. In my opinion, it is related to his work in the sense that exposure to grain dust can certainly aggravate this condition and even cause it. I am enclosing a copy of an extensive review of vocal cord dysfunction written by Wanis H. Ibrahim and colleagues. Please turn to the section called "Irritant-induced PVCMD" on page 166 to read a discussion of the role that dust and a variety of other stimuli can play. I do agree that psychological factors and stress play a role in Mr. Feller having persistent symptoms. I do believe that Mr. Feller can work but it is my opinion that he should not work in a setting where he is exposed to dust and fumes to a greater degree than he would be while engaging in usual activities of daily living in his home.

(JEx. 4, p. 74) On December 9, 2017, Dr. Von Essen wrote another letter to claimant's counsel. She reviewed additional medical reports and testing as well as the deposition of Dr. Hicklin. (JEx. 4, p. 83) Dr. Von Essen was asked what her final diagnosis was of the claimant. Her response was,

It is my opinion the [sic] Mr. Feller has occupational asthma. The severity is difficult to judge because of problems with testing his lung function. He also has severe vocal cord dysfunction as documented by Dr. Jill Poole. His symptoms are consistent with both problems being factors that cause his complaints of coughing and shortness of breath. Briefly, he worked in an industry in which occupational asthma is a common problem. Vocal cord dysfunction commonly occurs with or secondary to asthma. There is evidence in the medical literature that organic dust inhalation can cause vocal cord dysfunction. I therefore conclude that his workplace exposures caused these problems.

(JEx. 4, p. 84) Dr. Von Essen stated claimant's condition was permanent and would require additional treatments including medications, speech therapy and assessment by a mental health provider. (JEx. 4, p. 84) Dr. Von Essen provided restrictions of claimant not working where there is visible dust in the air on a regular basis or being exposed to

air less than 40 degrees Fahrenheit and not work with cleaners or be exposed to paint fumes. (JEx. 4, p. 86) I find that these are claimant's restrictions.

Claimant has requested costs of \$1,322.15. The costs are the \$100.00 filing fee, two reports of Dr. Von Essen for a total of \$1,125.00 and a deposition cost of \$97.15. (Ex. 4, p. 1)

RATIONALE AND CONCLUSIONS OF LAW

Claimant has asserted that his exposure to grain dust at Bunge and exposure to cold has caused an occupational disease under Iowa Code Chapter 85A.

Section 85A.8 defines occupational disease:

Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

Under Iowa Code section 85A.17, workers' compensation benefits as a result of an occupational disease are awarded under the relevant section of workers' compensation laws. In this case, claimant's injuries are considered an industrial disability and are evaluated under Iowa Code section 85.34.

In IBP, Inc. v. Burress, 779 N.W.2d 210, 214 (Iowa 2010) the supreme court held;

The legislature has set forth two workers' compensation schemes: one for injuries under Iowa Code chapter 85 and one for occupational diseases under chapter 85A. In order to qualify for workers' compensation benefits under chapter 85, the employee must demonstrate "(1) the claimant suffered a 'personal injury,' (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment." Meyer v. IBP, Inc., 710 N.W.2d 213, 220 (Iowa 2006). Comparatively, to recover under chapter 85A, "the disease must be causally related to the exposure to harmful conditions of the field of employment," and "those harmful conditions must be more prevalent in the employment concerned

than in everyday life or in other occupations.” McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980).

The court, in explaining the scope of occupational disease and workers’ compensation stated;

What types of diseases are strictly occupational diseases and not injuries is debatable. Prior to 1973, chapter 85A restricted recovery for occupational diseases to seventeen diseases specifically listed in Iowa Code section 85A.9 (1971). See McSpadden, 288 N.W.2d at 190. In 1973, the legislature repealed that section and broadened the definition of occupational disease in section 85A.8. Id.; see also 1973 Iowa Acts ch. 144, § 24. Currently, chapter 85A makes reference to only two diseases, brucellosis in section 85A.11 and pneumoconiosis (“the characteristic fibrotic condition of the lungs caused by the inhalation of dust particles”) in section 85A.13. Our case law has permitted recovery for allergic contact dermatitis and lead intoxication under chapter 85A. See Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 432 (Iowa 1984); Frit Indus. v. Langenwaller, 443 N.W.2d 88, 91 (Iowa Ct.App.1989). But see St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (allergic reactions may be considered injuries under *216 chapter 85). In McSpadden, we noted other states considered the following to be occupational diseases: chronic bronchitis, kidney disorder and asthma caused by inhalation of paint fumes, and pulmonary disease caused by inhalation of smoke and fumes. McSpadden, 288 N.W.2d at 190-91 n. 5. Although chapter 85A no longer limits recovery for occupational diseases to a specific schedule, section 85A.8 and our case law indicate an occupational disease is generally acquired from repeated exposure to a toxin in the workplace. See Doerfer, 359 N.W.2d at 432-33.

IBP, Inc. v. Burrese, 779 N.W.2d 210, 215–16 (Iowa 2010).

There are three well qualified pulmonologists in this case with differing opinions.

Dr. Hicklin has opined that while claimant has occupational asthma, his current symptoms are not related to his work at Bunge and that his primary condition is vocal cord dysfunction. Dr. Hicklin saw claimant one time. Dr. Hicklin admitted that claimant’s symptoms have remained unabated since February 5, 2014, however has opined that the symptoms are not related to his work exposure to dust and cold. I do not find his opinions convincing given his brief one time encounter with claimant.

Dr. Hicklin agreed that claimant’s symptoms have remained unabated since February 5, 2014; although he states that his current symptoms were unrelated to claimant’s work at Bunge. At a minimum, the convincing evidence shows that claimant’s occupational asthma and vocal cord dysfunction was lighted-up on February 5, 2014.

While claimant had received treatment for bronchitis in the past there is no convincing evidence that his current symptoms are related to bronchitis.

Both Dr. Southard and Dr. Von Essen have had extensive contact and provided treatment and testing of claimant and are much more familiar with his medical conditions. Dr. Southard has stated claimant's current symptoms were the result of his exposure to cold and grain dust from his work at Bunge. Dr. Southard opined claimant has RADS (Reactive Airway Disease Syndrome). Dr. Von Essen has performed research on grain dust exposure for her work with the University of Nebraska Medical Center. Given that experience, I find her opinions the most convincing.

I find claimant has suffered a personal injury that arose out of and in the course of his employment with Bunge and defendants admitted that the grain dust claimant was exposed to at Bunge where claimant worked was more prevalent than in general everyday life. (Ex. 1, p. 2) I find claimant's exposure to grain dust while working for Bunge was more prevalent than everyday life or other occupations. I find that claimant has an occupational disease. The injury is an industrial disability.

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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The claimant was discharged by Bunge as it had no work that he could perform. Utilizing the wage information provided by Ms. Stricklett, claimant has a significant loss in earning capacity. Assuming claimant could earn \$683.00 per week, which was the high end of wages claimant could expect as reported by Ms. Stricklett, it represents an about 50 percent loss in earnings that he was making at Bunge. Assuming claimant could earn \$382.00 per week, which was the low end of wages claimant could expect as reported by Ms. Stricklett, it represents an almost 75 percent loss in earnings.

Claimant has asserted he is totally disabled. While I find he has a very significant industrial disability, I do not find that he is permanently and totally disabled.

None of his physicians have opined that he cannot work and Dr. Von Essen has recommended he return to work. Claimant has been able to perform household chores and engage in some hunting activities. The claimant does have coughing fits that could preclude employment, but he has not attempted to work and based upon the medical

evidence no physician has opined that he should not attempt to work. Dr. Von Essen expressed concerns about claimant's ability to safely drive. Claimant has a limited education and most of his work experience in a grain mill and truck driving is precluded by his work injury. I find claimant has a 70 percent loss of earning capacity. Considering all the factors of industrial disability I find claimant has a 70 percent industrial disability, which entitles claimant to 350 weeks of permanent partial disability benefits.

The parties stipulated that permanent partial disability benefits would commence on February 5, 2015.

I find that the costs requested by claimant are reasonable and in my discretion I award claimant costs of \$1,322.15 pursuant to 876 IAC 4.33.

ORDER

Defendants shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits at the weekly rate of six hundred eighty-four and 58/100 dollars (\$684.58) commencing February 5, 2015.

Defendants shall pay claimant costs in the amount of one thousand three hundred twenty-two and 15/100 dollars (\$1,322.15).


Defendants shall have credit for all indemnity and medical expenses previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendants shall pay or reimburse claimant for all medical expenses casually related to his work injury.

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

Signed and filed this 28th day of November, 2018.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jacob John Peters
Attorney at Law
PO Box 1078
Council Bluffs, IA 51502-1078
jakep@peterslawfirm.com

Brian L. Yung
Attorney at Law
4280 Sergeant Rd., Ste. 290
Sioux City, IA 51106-4647
yung@klasslaw.com

JFE/srs

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.