BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTHONY OXLEY, Claimant, vs. LENNOX INDUSTRIES, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5067306 ARBITRATION DECISION Head Note Nos.: 1100, 1801, 1800, 1803, 3000, 2700, 2500, 2501

STATEMENT OF THE CASE

Claimant, Anthony Oxley, filed a petition on January 24, 2019, seeking workers' compensation benefits against Lennox Industries, Inc., employer, and Indemnity Insurance Co. of America, insurer, both as defendants, for an alleged work injury dated October 8, 2018.

The record consists of claimant's testimony and joint exhibits (JE) 1-5, claimant's exhibits (CE)1-6, and defendant exhibits (DE) A-F.

The matter was heard in Des Moines, Iowa, on January 16, 2020 and considered fully submitted upon the simultaneous filing of briefs on January 30, 2020.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of employment on October 8, 2018;
2. Whether claimant is entitled to temporary benefits from November 21, 2018 through January 7, 2019;
3. Whether claimant has sustained a permanent, disabling loss and if so, the extent of said loss;
4. The appropriate rate;
5. Whether claimant is entitled to repayment of medical expenses in Claimant's Exhibit 3;
6. Whether claimant is entitled to future medical care;
7. Assessment of costs.

STIPULATIONS

The parties agree that at all times material hereto, claimant was an employee of the defendant employer. During the period of November 21, 2018, through January 7, 2019, claimant was off work and if it is determined that defendants are liable for the alleged injury, claimant is entitled to benefits for this period of time. If there is an award of benefits, defendants are entitled to a credit of $2,096.17 for short-term disability benefits paid from November 21, 2018, through January 7, 2019.

While the parties disagree as to the causal connection between the medical bills itemized in Exhibit 3, they do agree that the fees or prices charged are fair and reasonable, the treatment was reasonable and necessary, that the listed expenses are causally connected to the medical condition upon which the claim of injury is based.

The parties agree claimant's disputed injury has resulted in a disability that is industrial in nature. At all times material hereto, claimant was married and entitled to three exemptions.

FINDINGS OF FACT

At the time of the hearing, claimant was a 60-year-old person. His past educational history includes a GED obtained in 1978 and an Associate's Degree in 1987. He began working for defendant employer in the early 1990s. At all times material hereto, claimant was married with one dependent son.

Claimant's past medical history is significant for skull fracture, crush injury to left leg, bilateral lateral epicondylitis, bilateral shoulder pain, right knee pain and right third ring trigger finger. (DE C:13)

On or about October 2018, claimant was a Replacement Operator. As a Replacement Operator, he would float from station to station and fill in for the operators while they were on vacation or out ill. It was not a physically demanding position until a tornado caused damage to the plant in July 2018. After a work stoppage, claimant was assigned to deliver product to different stations. He was required to push a cart through the plant. When empty the cart weighed several hundred pounds and when full, exceeded five hundred (500) pounds. The condition of the plant made it difficult to maneuver as there were many cables, hoses and other obstacles on the floor. At times, he and a co-worker would have to lift the cart over obstacles to navigate the work environment. Besides pushing and lifting the cart, he would be required to load and unload the product.

Claimant testified that he was averaging 60-70 hours a week. This is not born out by the payment records. In the wage calculation of the claimant, he worked 23.7 hours on the low end and 53.5 hours on the high end. (CE 2:2) Most of the weeks were between 37 to 42 hours with some outliers. (CE 2:2) To the extent that claimant's testimony differs from his time sheets, the time sheets are relied upon. It is found that claimant worked around 40 hours per week in the 13 weeks preceding the work injury including the time period after the plant damage in July 2018.

Claimant was seen for chronic neck pain. (JE 2:4) At that time, he reported a fever, muscle aches and joint pain but no abdominal pain. (JE 2:4) He was prescribed hydrocodone 10 mg along with acetaminophen. (JE 2:5)

On or about September 2018, claimant testified he developed a burning sensation on the right-side of his abdomen and a bulge. A co-worker suggested that claimant may have a hernia. Claimant scheduled an appointment with his primary care provider, Steven Scurr, D.O. (JE 2:6)

Prior to his appointment with Dr. Scurr, claimant saw the plant nurse who scheduled him for an appointment at Ankeny Iowa Ortho office. (JE 1:2) There was no mention of the groin pain to the company nurse.

On October 9, 2018, claimant saw Dr. Scurr who diagnosed claimant with an inguinal hernia, however, Dr. Scurr was uncertain as to the origin of the hernia. (JE 2:6) He wrote,

> He is here today has had some pain in the right groin down in the inguinal ligament down into the proximal Estilinguinal ligament on physical exam he certainly has a inguinal hernia on this side but I think that has been there for a while tenderness is described as some sharp or stabbing discomfort in inguinal region worse when he flexes at the hip is been a lot more lifting at work.

(JE 2:6) Dr. Scurr prescribed claimant a trial of meloxicam and instructed claimant to practice good lifting techniques and proper back etiquette. (JE 2:7)

Claimant returned to the company nurse and informed RN Cline of the hernia. “He believes that the hernia has been caused by lifting top caps and occurred at the same time he injured his knee,” RN Cline documented. (JE 1:2) Since the orthopaedic visit was already scheduled, a request was made that claimant’s hernia condition be examined at the same time. Id.

On October 12, 2018, claimant was seen by KellyJo Balignasay ARNP regarding the inguinal hernia. (JE 3:14) She referred him to a general surgeon. (JE 3:14) Nurse Practitioner Balignasay felt that the cause of the hernia was most “likely due to a combination of muscle wall weakness and increased ultra-abdominal pressure from recurrent strenuous events (repetitive heavy lifting).” (JE 3:14) The surgeon, Steven F. Van Buren, saw claimant on October 29, 2018. (JE4:18) Dr. Van Buren noted claimant had been working hard and that he should undergo surgery to repair the hernia.

On November 6, 2018, the insurer sought out clarification from Dr. Van Buren to determine whether the hernia was work related. (JE 4:22) Dr. Van Buren asked claimant to return for an evaluation. In the meantime, claimant sought out care from his personal physician due to the delay in the approval and the pain. Dr. Scurr referred claimant to John McCune M.D., who performed the repair on November 21, 2018. (JE 5:26, 29) During the initial examination, claimant reported that he had been engaged in a lot of heavy lifting at work but denied that it was a worker’s compensation matter. (JE 5:26)

One month following the surgery, claimant returned to Dr. McCune's office and reported normal bowel movements, regular diet and no pain. (JE 5:32)

In Dr. Van Buren's medical records, it was noted that claimant was doing well after the surgery. (JE 4:24)

On October 8, 2018, Paul A Conte, M.D., issued an opinion that while claimant did have an inguinal hernia when he was evaluated on October 8, 2018, Dr. Conte felt that it was a long-standing one. "He had a complete loss of integrity of his inguinal floor as well as an indirect hernia. This is not the sort of hernia that occurs through a sudden injury, but it is a chronic wear-and-tear type of hernia that is caused by breakdown of the normal tissues as well as progressive and prolonged use." (DE A:4) Dr. Conte felt that claimant's outside activity such as chopping wood for his furnace and his longstanding history of smoking which makes one more prone to breakdown of tissue were the cause of the hernia rather than claimant's work. (DE A:4) Claimant maintained he stopped smoking in 2011 and that his heaviest daily exertions were performed at work.

Dr. Conte opined that claimant's results from the surgery were good and that claimant did not need any permanent work or activity restrictions. He also assigned no permanent impairment. (DE A:5)

On December 2, 2019, Dr. McCune wrote that it was his medical opinion that claimant's inguinal hernia was a direct result of his heavy lifting. (CE 1:1) "Specifically, it occurred during the clean up after the tornado of July 2018. Mr. Oxley was unable to obtain timely treatment for his hernia and the resulting significant pain through the worker's compensation system." (CE 1:1) Dr. McCune also noted that the symptoms were relieved by the surgery. (CE 1:1)

Claimant's testimony was troubling at times. He exaggerated the number of hours he worked prior to the date of the injury. He denied having a wood burning furnace in his home but when confronted with his deposition testimony conceded that he did have a wood burning fireplace in his garage and shop and chopped wood for that. To the extent that there was a discrepancy between the contemporaneous medical records and the claimant's hearing testimony, the medical records and documentation created prior were given more weight.

Claimant testified at hearing that he has constant pain at the surgical site and a palpable bulge. There is no medical evidence to support this as he has not returned for care even though he had his hernia treated under his health insurance, but claimant testified he would like to return to Dr. McCune. Claimant has the same medical health insurance that provided for his previous visits to Dr. McCune but he has not availed himself of those benefits.

Claimant testified that incentive pay is a substantial portion of his earnings and therefore should be included in any wage calculation. Based on the union agreement, claimant receives a higher wage while on vacation and believes that higher wage is to

offset the lack of incentive pay. (CE 2:2) Claimant maintains his gross weekly earnings were $983.00 per week for a benefit rate of $644.45. Defendants' wage calculation excludes overtime rate and vacation rate for gross weekly wages of $936.40 and a weekly benefit rate of $616.86. (DE:17)

Claimant's costs include a filing fee, service fee, and the December 2, 2019, report of Dr. McCune for a total of $226.80. (CE 6:29)

CONCLUSIONS OF LAW

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

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

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

Claimant maintains that his hernia developed over time as a result of heavy lifting following the damage to the plant in July of 2018. In support of his claim, he relies on the expert opinion of Dr. McCune who opined that the hernia was the result heavy lifting at the worksite following the tornado damage and the lack of timely treatment.

Defendants argue that Dr. McCune's opinion must be disregarded because it was based on erroneous facts. Claimant testified that he was working 7 days a week and 10 hours a day. Per the findings of fact, claimant's work hours are deemed to be around 40 hours per week. While Dr. McCune's opinion was based in part on the claimant's history, it was also based on Dr. McCune's experience, the visualization of the damage during surgery, as well as claimant's heavy lifting and extra exertion at work

which was not disputed. Dr. Conte also acknowledges that heavy lifting activities could have contributed to the development of the hernia but identifies claimant's work at home as the primary cause along with the weak tissue resulting claimant's history of smoking. It is not likely that claimant was chopping and hauling wood on a more frequent basis than he was lifting heavy objects at his place of work. Nurse Practitioner Balignasay felt that the cause of the hernia was most likely due to a combination of muscle wall weakness and increased ultra-abdominal pressure from recurrent strenuous events consistent with Dr. Conte and Dr. McCune's opinions.

Dr. Conte confirms Dr. McCune's opinion that heavy lifting was likely a contributory factor in the development of claimant's hernia. Taking Dr. Conte's opinion and that of Dr. McCune, it is more likely than not that claimant's inguinal hernia was caused by the work he performed post July 2018.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Based on the foregoing, claimant is entitled to temporary benefits from November 21, 2018, through January 7, 2019, when he was off work following his hernia surgery. Permanent benefits commence on January 8, 2019, when he returned to work.

Claimant is also entitled to reimbursement of medical expenses and future medical care as it is related to his surgery. Claimant specifically requests an order to return to Dr. McCune. The Supreme Court has confirmed that when an employer denies care, it loses its authorization defense for the care that the employee has requested. Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 245 (Iowa 2018) (quoting R.R. Donnelly

& Sons v. Barnett, 670 N.W.2d 190, 196–98 (Iowa 2003)). Defendants denied that claimant's hernia was the result of his work and lost their right to direct his case. Thus, defendants cannot now object to claimant returning to Dr. McCune for follow up treatment for the hernia.

While claimant maintains he has significant pain following the hernia surgery and into the current time period, the medical records are not reflective of this. Dr. McCune noted claimant had no problems following surgery. When Dr. Van Buren's office called to schedule an appointment with claimant, claimant relayed that he had already had the surgery and was doing well. There is no change in claimant's work and no accommodations. He has no restrictions. There is not sufficient evidence to find a permanent and disabling impairment. No award of permanency is given at this time.

However, given that temporary benefits are owed, the question of rate must be answered. Claimant argues that vacation pay should be factored into his wages while defendants argue that it is premium pay that should not be included.

Iowa Code section 85.36 describes the basis for calculating a disabled employee's compensation rate. "The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36.

> In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). There is no explicit exclusion of what the defendants call premium pay. Instead, the focus is on the claimant's customary earnings.

> We do not interpret the word "customary" so rigidly as to conclude that just because an employee's schedule or output is neither fixed nor guaranteed, the employee cannot have "customary" earnings. "Customary" means "based on or established by custom"; "commonly practiced, used or observed"; or "usual." Merriam–Webster's Collegiate Dictionary 285 (10th ed.2002). We have previously defined "customary" as "typical." Griffin Pipe, 663 N.W.2d at 866. Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or

typical for that employee. As discussed above, an employee need not justify the variance with a particular explanation.

Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 199 (Iowa 2010) In this case, there is no showing that vacation pay is not customary for employees of the defendant. It is a bargained for benefit that extends to union employees, of which claimant is one. It is customary for employees to take vacation days and it is customary for them to be paid at a particular rate. It is not a bonus or a shift differential, although it does take into account incentive pay that is paid while an individual works. Based on the greater weight of the evidence, claimant's calculation of the benefits is deemed to represent the customary wages and therefore claimant's wage calculation is adopted.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant temporary disability benefits at the rate of six hundred forty-four and 45/100 dollars ($644.45) per week from November 21, 2018 through January 7, 2019.

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

That claimant is entitled to reimbursement of medical bills in Exhibit 3 and future medical for the inguinal hernia.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this __18th__ day of March, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James M. Ballard (via WCES)

Robert Gainer (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.