BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RONALD N. MCDONALD,<br><br>Claimant,<br><br>vs.<br><br>EZ PAYROLL & STAFFING SOLUTIONS, LLC,<br><br>Employer,<br><br>and<br><br>ZURICH AMERICAN INS. CO.,<br><br>Insurance Carrier,<br>Defendants. | File Nos. 5043916; 5048386<br><br>APPEAL<br><br>DECISION<br><br>Head Note Nos: 1100; 1108; 1402.30 |

FILED
JUL 27 2017
WORKERS' COMPENSATION

Defendants EZ Payroll & Staffing Solutions, LLC, employer, and its insurer, Zurich American Ins. Co., appeal from an arbitration decision filed on January 14, 2016. Claimant Ronald N. McDonald responds to the appeal. The case was heard on June 16, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 10, 2015.

In File No. 5043916, stipulated injury date of August 27, 2012, for a work-related injury to claimant's left hand, the deputy commissioner found claimant is entitled to healing period benefits from August 27, 2012, through September 2, 2012. Permanent disability benefits were not in dispute in File No. 5043916. The deputy commissioner found claimant is entitled to payment of $1,897.50 pursuant to Iowa Code section 85.39 for one half of the cost of the independent medical evaluation (IME) of Sunil Bansal, M.D., performed on January 9, 2015. The deputy commissioner found claimant is entitled to payment of court costs in the amount of $112.98 for filing and service fees.

In File No. 5048386, alleged injury date of September 3, 2012, the deputy commissioner found claimant carried his burden of proof that on September 3, 2012, he contracted Legionnaires' disease which arose out of and in the course of his employment with defendant-employer. The deputy commissioner awarded claimant permanent total disability benefits commencing on September 3, 2012, for this injury. The deputy commissioner found claimant is entitled to payment of requested past medical expenses totaling $192,916.23 for treatment of the Legionnaires' disease.

The deputy commissioner found claimant is entitled to payment of all future medical expenses necessitated by the Legionnaire's disease. The deputy commissioner found claimant is entitled to payment of court costs totaling $250.00 for the filing fee and for the report of Jack T. Stapleton, M.D.

In both files, the deputy commissioner found claimant is entitled to payment of $3,000.00 for the vocational assessment evaluation and report of Kent Jayne, M.A., M.B.A. The deputy commissioner ordered defendants to pay $458.00 for transcription costs for the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in File No. 5048386 in finding claimant satisfied his burden of proof that his Legionnaires' disease arose out of and in the course of his employment with defendant-employer. Defendants assert even if it could be established claimant's Legionnaires' disease was caused by his employment, the deputy commissioner erred in finding claimant sustained any permanent disability as a result of the Legionnaires' disease.

Claimant asserts 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 14, 2016, which pertain to File No. 5043916. I affirm the deputy commissioner's finding in both files that claimant is entitled to payment for the vocational assessment evaluation and evaluation report of Mr. Jayne.

I reverse the deputy commissioner's finding in File No. 5048386 that claimant carried his burden of proof that his Legionnaires' disease arose out of and in the course of his employment with defendant-employer. I reverse the deputy commissioner's finding that claimant is entitled to payment of the past medical expenses totaling $192,916.23 for treatment of claimant's Legionnaires' disease. I reverse the deputy commissioner's finding that claimant is entitled to payment of all future medical expenses necessitated by the Legionnaires' disease. I also reverse the deputy commissioner's order that defendants pay the transcription costs for the arbitration proceeding. I provide the following analysis for these findings:

## FINDINGS OF FACT

As an employee of defendant-employer, claimant worked as a temporary worker at ALPLA in Iowa City. Claimant worked in the mold department at ALPLA as a packaging operator with two other employees. (Hearing transcript, pages 40-41)

Claimant's job responsibilities at ALPLA involved cleaning molds used in the manufacturing of plastic food and beverage bottles. Claimant's first day of work at ALPLA was August 20, 2012. (Tr. p. 40)

At the same time claimant was working for defendant-employer at ALPLA, he also worked a second job as a janitor at Proctor & Gamble (P&G) in Iowa City through Sodexo, a different temporary employment service. At P&G, claimant worked with mops and buckets of water cleaning restrooms. (Tr. pp. 36, 81-84) His last day of work at P&G was August 24, 2012. (Tr. pp. 37, 50) Claimant was terminated by Sodexo because of a "discrepancy" regarding a failed drug test. (Tr. p. 38)

On August 27, 2012, while working at ALPLA, claimant sustained a laceration to his left hand. He underwent surgery at Mercy Hospital in Iowa City that same day. (Exhibit 2 in File No. 5043916, pp. 13-14) He did not work the rest of the week. He was scheduled to be seen in follow-up on August 31, 2012, but this did not occur that day because claimant was experiencing flu-like symptoms. (Ex. B, pp. 3-4)

On September 3, 2012, claimant appeared at the emergency room at Mercy Hospital in Iowa City with significantly abnormal neurologic status. He was transferred to the intensive care unit where he underwent testing which came back positive for Legionella pneumonia. It was noted Legionella comes from contaminated water, but no potential source of contaminated water was identified or discussed. (Exhibit 2 in File No. 5048386, pp. 5-17)

At that time, claimant was also by coincidence diagnosed with HIV, which is not alleged to be work-related. A brain CT scan showed a lesion which was thought to represent a corpus callosum stroke. (Id. at p. 4)

On September 4, 2012, claimant was transferred to the University of Iowa Hospitals and Clinics (UIHC), where he was hospitalized from September 4, 2012, through September 12, 2012. (Ex. 3 in File No. 5048386, p. 18) Legionnaires' disease was the diagnosis along with HIV and untreated hypertension. No source for the Legionnaires' disease was identified or discussed. It was noted on discharge that the symptoms of altered gait and slurred speech had improved and were beginning to clear as expected with treatment of the Legionella pneumonia. (Id. at p. 19) Claimant's corpus callosum lesion was identified as not a stroke, but instead as a "reversible" lesion which would improve as the Legionnaires' disease was treated. (Id. at pp. 32, 36) Claimant was directed to follow up with the neurology clinic at UIHC in three months. (Id. p. 19)

Claimant underwent inpatient rehabilitation at St. Luke's Hospital in Cedar Rapids from September 12, 2012, through September 21, 2012. On discharge, it was noted claimant had made "exceptional gains" but should wait another two weeks to return to work. (Ex. 4 in File No. 5048386, pp. 112-116)

On September 26, 2012, claimant was seen in the infectious disease department at UIHC and counseled about his HIV. It was noted, "He is still in shock and disbelief that he has gotten HIV." (Ex. 3 in File No. 5048386, p. 41) He was seen by Jack Stapleton, M.D. Claimant reported he was feeling very well. (Id. p. 42) He was "upset about his recent HIV diagnosis." He was given an influenza vaccine and Hep A/B vaccine and he was told to return in one month. (Id. p. 43)

On October 17, 2017, claimant returned to the neurology department at UIHC. He reported he was "overall doing very well. He feels his speech is significantly improved and approximately 85% back to normal." (Id. p. 46) His walking/ataxia was "also significantly improved; he represents this as approximately 95% better. He has even been jogging actually." (Id.) Claimant reported his breathing "is also significantly improved and he still only gets mildly winded with exercise, but other than that, he feels much better." He denied any headache, weakness, paresthesias or vision changes. (Id.) He expressed a desire to return to work, but was concerned about his injured hand and being able to handle heavy equipment because of the hand injury. (Id. p. 48) It was noted claimant was "not quite back to 100% of functioning but do expect him to continue to improve." (Id. p. 49)

On November 5, 2012, Dron Lamichhane, M.D., in the department of neurology at UIHC released claimant to perform the work he was doing before being hospitalized. (Id. p. 50) At that time, claimant reported his speech was "his only impairment which is again mostly back to normal." (Ex. K, p. 9) There was "mild dysarthria and minimal to no ataxia." His ataxia had "essentially resolved." He was intact to all motor tasks. He was independent in mobility. His exam was "essentially normal today, though he does tend to stumble on some words from time to time." (Id. pp. 10-11)

Claimant returned to work at ALPLA in November 2012, was given a different job assignment, but quit in December 12 due to a family member's illness and because he was having problems with his injured hand. (Tr. pp. 61, 117) He also quit a subsequent job at Gordman's due to problems with his hand. (Tr. p. 63)

On December 6, 2012, claimant returned to the infectious disease department at UIHC with new onset of headache, imbalance and memory loss. (Ex. 3 in File No. 5048386, p. 52) Dr. Stapleton evaluated claimant on that date and opined claimant's new symptoms "may represent a side effect of Rilpivirdine" which was used to treat claimant's HIV. (Id. p. 52) Previously, on November 7, 2012, Dr. Stapleton noted claimant's central nervous symptoms "could be due to HIV." (Ex. K, p. 13) Complera, another of claimant's HIV medications was stopped at that time. (Ex. K. p. 15)

Claimant was re-evaluated in the infectious disease department at UIHC on January 30, 2013. The attending physician, Dr. Meier, noted ". . . soon after the patient started this regimen, he became quite drowsy his ataxia and dysarthria have been significantly worse with labored breathing, worsening imbalance, headaches and

confusion." (Id. p. 17) Claimant reported marked improvement in his symptoms after his HIV medications were changed. (Id. p. 18)

On February 27, 2013, claimant was evaluated in the neurology department at UIHC. It was noted he returned to work at ALPLA but "secondary to some forgetfulness," he had been fired from that employment. (Ex. 3 in File No. 5048386, p. 54) He reported some slurring of his speech if he tried to speak too quickly, he was having headaches secondary to anxiety, and he was worried about a relapse of his Legionnaires' disease. (Id.) He endorsed "subjective problems with minor ataxia" worse with fatigue. (Id. p. 55)

On April 2, 2013, claimant was seen in the psychology department at UIHC. The evaluating practitioner, Colleen Brems, ARNP, noted claimant reported making progress with memory, but not 100 percent." Claimant "quickly feels he is making progress and doesn't want Neuropsych testing at this time." He acknowledged "many worries" specifically pertaining to his HIV status and having to be compliant with treatment regimens. It was also noted claimant was not working and the mother of his children recently passed away. (Id. pp.57-58)

Claimant was seen again in the psychology department on April 15, 2013, and again related anxiety due to his HIV status. Ms. Brems' impression was "cognitive changes following CNS Legionella involvement associated with his HIV." (Id. p. 61)

On September 11, 2013, claimant was re-evaluated in the psychology department at UIHC with the chief problem of non-compliance with taking his HIV medications since May of 2013. Ms. Brems' diagnosis included "Dementia due to HIV associated with CNS Legionella." (Id. p. 64)

On October 23, 2013, claimant returned to UIHC for his low mood, continued cognitive issues and HIV treatment. He reported he was working, had a new apartment and was feeling much better. (Id. pp. 65-66)

When claimant returned to Ms. Brems again on December 18, 2013, he reported being anxious because he was not taking his HIV medications as prescribed. (Id. p. 69) Over the next year, claimant continued to return to UIHC for medication management for his HIV. (Ex. K, pp. 45-58)

Claimant returned to Ms. Brems in the psychology department on December 31, 2014. He reported decreased mood in connection with coping with his HIV diagnosis and the stigma attached to that condition. Claimant reported he was working 20 hours per week for a motel in housekeeping and moved up to a supervisory position. It was felt claimant was medically stabilized. (Ex. 3 in File No. 5048386, pp. 73-76)

At a follow-up with Ms. Brems on January 21, 2015, claimant reported his cognitive issues were mild. He reported he received a raise and was now a team leader

in his employment at the motel. He was capable of checking in guests if needed and was viewed as a resource for newer employees. (Id. p. 78)

Claimant continued to return to UIHC for follow-ups for his HIV treatment as well as continued treatment for mental health and cognitive functioning. (Id. pp.82-111; T. pp. 55-56) On May 13, 2015, claimant report he was doing well and keeping busy with work, although he indicated he needed to monitor his hours of work and his income so as not to jeopardize his disability benefits. (Ex. 3 in File No. 5048386, p. 105)

Dr. Stapleton, the infectious disease specialist at UIHC, who treated claimant for his HIV, but did not treat him for his Legionnaire's disease, signed a report dated December 23, 2014, which was drafted by claimant's counsel. In that report, Dr. Stapleton stated the following with regard to the issue of causation:

> 2. Mr. McDonald was hospitalized on September 3, 2012 for Legionnaires' Disease which manifested in his central nervous system, liver and lungs. It is my opinion that Mr. McDonald was exposed to the Legionella bacterium and contracted Legionella pneumonia during his work at ALPLA while spraying molds during the latter part of August 2012.

(Ex. 5 in File No. 5048386, deposition exhibit 2)

Dr. Stapleton's evidentiary deposition was taken by claimant on March 3, 2015. Dr. Stapleton addressed the issue of causation of claimant's Legionnaires' disease during his deposition:

> Q. All right. What I want to ask you is within a reasonable degree of medical certainty, do you have an opinion as to how Ronald McDonald contracted Legionnaires' disease?
>
> A. Based on the history and the epidemiology and given the exposure to mists - - sprays and mists of water, water mist at his employment the week prior to his first fever and the Monday prior to his first fever on Friday before Labor Day, then diagnosis on - - ten days later, the epidemiology strongly supports that the most likely source is from the spray at work.
>
> Q. And the incubation period is - - his development of fever would have been right in the middle of the - - roughly - -
>
> A. Two to 14 days, and he was last at that work on Monday morning, and he had a fever at I believe his surgeon's on the Friday, Friday five days later, and he was then exposed to the spray the entire week before that, so he had a - - the timing is - - is highly - - makes it highly likely that that's the source.

Q. Now, was Ron more susceptible to - - not necessarily to contracting Legionnaires' because you've testified that a lot of people can contract it, but the seriousness of the infection is related to the defenses of the host or the person that has contracted Legionnaires'. So was Ron more likely to get a serious Legionnaires' infection, given aspects of his history?

A. So based on HIV, there's not a lot of data to say yes or no, but based on looking at patients with other immune-compromised situations like hemologic malignancies, for example, those patients do have more severe and it would generally be considered by I think most infectious disease physicians that his risks of acquiring Legionella, there's no evidence that that's increased but that the severity would likely be greater because of HIV infection.

Q. So just to summarize, water vapor in the air, whether, say from a pressurized water system or from being blown into the air by a compressed air system would expose Ron to Legionnaires' if it was in that water and he inhaled it.

A. Correct.

(Ex. 5 in File No. 5048386, deposition pp. 30-32)

During cross examination by defense counsel, Dr. Stapleton testified as follows:

Q. And as you said, with that water vapor being present at this facility, would there be a likelihood that other people would have contracted it if, in fact, Legionella was present in that water?

A. There would be an increased risk.

(Id. deposition p. 38)

Q. And in your practice, have you come across Legionella outbreaks within a workplace?

A. Yes.

Q. And in those incidents, are there often just isolated incidents or do they involve multiple employees when this occurs?

A. Both.

(Id. deposition p. 40)

Q. So there is a test that can be conducted that would tell you whether or not the virus or the pathogen's in the water?

A. The bacteria.

Q. The bacteria.

A. Yes.

Q. So if that's something - - a test that would have been done during that same period of time, the incubation period of August of 2012, if that test comes back negative, then that mist then would, therefore, be deemed negative as well. Correct?

A. That would decrease the risks significantly.

(Id. deposition p. 53)

On January 9, 2015, claimant underwent an IME with Sunil Bansal, M.D, occupational health physician. (Ex. 9 in File No. 5048386) In his IME report, Dr. Bansal stated the following with regard to the causation of claimant's Legionnaires' disease:

> In my medical opinion, Mr. McDonald contracted his Legionella infection from his work with high pressure water systems. Legionella is a bacteria that multiplies in water systems, and is spread by inhaled droplets. A close examination of Mr. McDonald's job duties indicates a high risk exposure probability:
>
> When he arrived at work each day, he would put the molds on the hoist, bring them to his table, take them apart, and start cleaning them. He checked the molds for leaks using a water hose that was connected to some pipes in the wall at a metal laundry sink that had multiple water connections. He used a coiled blue hose that he would pull over to his table to check the molds for leaks. He would also, he recalls, use compressed air to blow residual water out of the molds which caused water vapor to blow back that he inhaled at times. He stood over a drain and a mat on the floor, and water would drain beneath his feet. His shirt became damp and wet from leaning against the table during the day, although not drenched. He wore no protective gear while cleaning the molds, other than goggles, ear plugs, and a hairnet to cover his long hair. He wore no apron, gloves, coveralls, or anything protecting his skin or clothing during the cleaning process. He did have to wear steel-toed shoes.
>
> Furthermore, the incubation period (time from exposure to disease manifestation) for Legionella is 2 to 14 days. This is important from a causational standpoint related to Mr. McDonald. This literally means that

> he incurred his exposure somewhere between August 20, 2012, and September 1, 2012.
>
> The main unique exposure that Mr. McDonald had during this time period was inhalation of blown back water droplets secondary to the use of pressurized air to blow residual water out of molds. It should be noted that secondary to Mr. McDonald's HIV status, he is more immunocompromised than the general population and more susceptible to this kind of exposure.

(Ex. 10 in File No. 5048386, pp. 180-181)

Dr. Bansal's comment in his report quoted immediately above that claimant was more susceptible to contracting Legionnaires' disease because of his HIV is directly contradicted by Dr. Stapleton's deposition testimony quoted above at page seven.

On August 24, 2015, Richard Aiken provided an Affidavit in this matter on behalf of defendants which states the following:

> I, Richard Aiken, after first being duly sworn and having personal knowledge of the facts stated herein state as follows:
>
> 1. That I am the Environmental Health and Safety Manager for ALPLA and in that capacity I am responsible to manage and mitigate all risks that may be encountered by team members within our facility located at 2258 Heinz Road, Iowa City, IA 52240.
>
> 2. One of the responsibilities of my position is to mitigate risks to prevent contaminants from entering our facility or interfere with our manufacturing process.
>
> 3. All water within the facility is supplied by the City of Iowa City which contains several additives to control microbes and bacteria as well.
>
> 4. Additionally, ALPLA utilizes a closed circuit water system which is highly controlled and is treated using a product called "ChemAqua" to control any biological issues to comply with food grade manufacturing processes.
>
> 5. I am aware of Mr. McDonald's claims regarding an alleged legionella exposure on or about September 3, 2012.
>
> 6. Mr. McDonald was placed at our facility through a temporary staffing agency and worked in the mold shop at ALPLA starting on approximately August 17, 2012. His job was cleaning disassembled molds so they could be put back into use.

7. This job was performed by other individuals alongside Mr. McDonald as well as on other shifts at the facility during the hours of operation using cold water (below 68 degrees Fahrenheit) in order to further reduce any risk of potential contamination. Mr. McDonald sustained an injury to his left hand on August 27, 2012 and did not return to ALPLA following that incident.

8. After learning of Mr. McDonald's claims regarding his Legionella exposure, I conducted an investigation and reviewed our records dating back to 2010.

9. It is my sworn testimony that ALPLA's water supply has never been compromised with Legionella bacteria at any time to my knowledge. Furthermore ALPLA has no reported cases of Legionella, pneumonia, any respiratory conditions, infections, or exceptional health issues from any team member before, during or after Mr. McDonald's brief period of employment at ALPLA.

(Ex. H)

Defendants obtained a report from David S. McKinsey, M.D., who is with Infectious Disease Associates of Kansas City, P.C. In formulating his opinions in this matter, Dr. McKinsey reviewed all of the relevant medical records, the depositions of claimant and Dr. Stapleton, and also Mr. Aiken's Affidavit. In his report dated May 11, 2015, Dr. McKinsey stated the following in pertinent part:

<u>Clinical summary and opinions</u>:

> Mr. McDonald had confirmed Legionnaire's disease which was diagnosed on 9/2/12. The infection was complicated by transient rhabdomyolysis and by encephalitis with a corpus callosum lesion that later resolved. At the same time a new diagnosis of human immunodeficiency virus infection, with modest immunodeficiency, was established.
>
> In retrospect the first symptom that could be attributed to Legionnaire's Disease was the history of sweats he reported on 8/29. His high fever on 8/31 almost certainly was secondary to Legionnaire's Disease. When Mr. McDonald presented for medical care on 9/2 he had extensive pulmonary infiltrate and a brain lesion; these findings would not have been observed until after his infection had progressed for several days.
>
> Human immunodeficiency virus infection is not a risk factor for Legionnaire's Disease and these two diagnoses are unrelated.
>
> Mr. McDonald's pneumonia responded promptly to treatment but he had residual ataxia which improved substantially over a period of 2 months.

He has had ongoing dysarthria which has improved. He has had ongoing residual memory lapses.

Two weeks after he began taking Complera for his HIV infection he developed drowsiness, headaches and imbalance which improved after the medication was discontinued. These symptoms were attributed to drug toxicity. Subsequently he became depressed and attempted suicide on one occasion. He has been followed in the Psychiatry clinic and has been treated for depression. He has been nonadherent with his HIV treatment regimen on at least one occasion and has not followed up with his neurologist.

The incubation period of Legionnaire's Disease is between 2-10 days with an average of 4-6 days. Given an onset of symptoms on 8/29/12, it can be extrapolated that Mr. McDonald was exposed to Legionella bacteria sometime between 8/19 and 8/27/12.

The source of Mr. McDonald's infection cannot be identified based on the available information. Between 65-95% of cases of Legionnaire's Disease are sporadic, i.e. not associated with an epidemic, as was the case with Mr. McDonald's illness. If Mr. McDonald had a workplace exposure to *Legionella pneumophila,* the causative agent of Legionnaire's Disease, a point-source epidemic likely would have occurred, i.e. multiple individuals with similar exposures would have developed infection. In this case none of Mr. McDonald's coworkers developed Legionnaire's Disease, strongly arguing against an occupational source of his infection.

Concentrations of Legionella bacteria are extremely low in potable city water, as was used in the power washers at ALPLA. Further, Legionella bacteria proliferate in warmer water and ALPLA's practice of cooling its water to temperatures below 68 degrees would have reduced the likelihood of any contamination with Legionella. Many nonoccupational exposures have been associated with Legionnaire's Disease have been reported including: recent plumbing in a home; disruptions of water supplies leading to "brown" tap water; living in a home with an older water heating system; or proximity to cooling towers, decorative fountains, or whirlpool spas. Thus, it is not possible to determine which of these many possible non-occupational routes of transmission caused Mr. McDonald's infection.

(Ex. D, pp. 3-4)

## CONCLUSIONS OF LAW

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Treating physicians' opinions are not to be given greater weight as a matter of law, when compared with non-treating physicians. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994).

Both Dr. Stapleton and Dr. Bansal appear to be entirely unaware of the procedures followed by ALPLA to prevent contamination of its water supply. Nowhere

in the record of this case does it appear either doctor was ever provided with this information. The procedures followed by ALPLA at all times, including the short time period during which claimant worked at ALPLA, include using water supplied by the City of Iowa City, which contains several additives to control microbes and bacteria, using a highly-controlled closed-circuit water system inside the facility and treating the water used within that closed-circuit system with a product called ChemAqua "to control any biological issues to comply with food grade manufacturing processes" and using cold water below 68 degrees Fahrenheit. (Ex. H, pp. 1-2) Nothing in the record indicates Dr. Stapleton and Dr. Bansal were ever made aware of this information. This is crucial information which goes to the very heart of the issue of causation in this matter. For the causation opinions of Dr. Stapleton and Dr. Bansal to be persuasive, it not only needs to be shown they were aware of this information, but they would also need to comment why, knowing this information, they would still believe claimant was exposed to the Legionella bacterium while working at ALPLA instead of being exposed elsewhere. None of this is addressed by either Dr. Stapleton or Dr. Bansal. I therefore find the opinions of Dr. Stapleton and Dr. Bansal to be unconvincing, as those opinions pertain to the causation of claimant's Legionnaires' disease, because it appears Dr. Stapleton and Dr. Bansal relied upon incomplete information in formulating those opinions.

On the other hand, while Dr. McKinsey did not actually evaluate claimant, I find Dr. McKinsey's causation opinion to be persuasive because Dr. McKinsey makes it clear in his report he was aware of the crucial information which was not provided to Dr. Stapleton and Dr. Bansal. (Ex. D, p. 3) Dr. McKinsey provides a logical and credible explanation as to how claimant was exposed elsewhere to the Legionella bacterium if the exposure did not occur at ALPLA. (Id. p. 4) Dr. McKinsey also states if claimant was exposed to the Legionella bacterium at ALPLA "a point-source epidemic likely would have occurred, i.e. multiple individuals with similar exposures would have developed infection. In this case none of Mr. McDonald's coworkers developed Legionnaire's disease, strongly arguing against an occupational source of his infection." (Id.) Dr. McKinsey's comments in this regard are supported by the following statement made by Mr. Aiken in his Affidavit: "This job was performed by other individuals alongside Mr. McDonald as well as on other shifts at the facility during the hours of operation . . ." (Ex. H., p. 2)

Because I find Dr. McKinsey's causation opinion to be persuasive, I therefore reverse the finding of the deputy commissioner and I find claimant failed to carry his burden of proof that his Legionnaires' disease arose out of and in the course of his employment with defendant-employer. Because I find claimant failed to carry his burden of proof on the causation issue, I also reverse the deputy commissioner's award of permanent total disability benefits. I find claimant is entitled to nothing in File No. 5048386. I find claimant is not entitled to payment of past medical expenses totaling $192,916.23 for treatment of the Legionnaires' disease. I also find claimant is not entitled to payment of future medical expenses necessitated by the Legionnaires' disease.

## ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 14, 2016, is MODIFIED as follows:

**For File No. 5043916 - date of injury August 27, 2012:**

Defendants shall pay healing period benefits from August 27, 2012, through September 2, 2012.

Defendants are entitled to a credit for all benefits previously paid.

Defendants shall pay all accrued and unpaid weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay one thousand eight hundred ninety-seven and 50/100 dollars ($1,897.50), one half of Dr. Bansal's IME fee.

Pursuant to rule 876 IAC 4.33, defendants shall pay one hundred twelve and 98/100 dollars ($112.98) for filing and service fees in the arbitration proceeding.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

**For File No. 5048386 – alleged date of injury September 3, 2012:**

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, defendants shall pay one hundred fifty and 00/100 dollars ($150.00) for the deposition appearance of Dr. Stapleton and one hundred and 00/100 dollars ($100.00) for filing fees in the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

**For both files:**

Defendant shall pay three thousand and 00/100 dollars ($3,000.00) for the evaluation and report of Mr. Jayne.

Signed and filed this 27th day of July, 2017.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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