BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KALEB HOLSINGER, Claimant, vs. EXIDE TECHNOLOGIES, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAY 23 2017 WORKERS COMPENSATION	File No. 5052911 ARBITRATION DECISION Head Note Nos.: 1100, 1801, 1803, 2401, 2500, 2502

STATEMENT OF THE CASE

Kaleb Holsinger, claimant, filed a petition in arbitration seeking workers' compensation benefits from Exide Technologies and American Zurich Insurance Company, defendants. The arbitration hearing was held on February 9, 2017. The parties filed post-hearing briefs on March 3, 2017 and the matter was considered fully submitted at that time.

The evidentiary record includes Joint Exhibits 1-18, which were admitted without objection. At the hearing, testimony was provided by claimant and Brenda Saunders, an occupational health nurse at the defendant employer's plant.

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.

ISSUES

1) Whether claimant sustained an injury that arose out of and in the course of his employment with defendant employer.

2) Whether the employer had notice of the injury within 90 days of the date of the occurrence of the injury.

3) Whether claimant is entitled to temporary disability benefits from April 10, 2014 through June 3, 2014.

4) Whether claimant is entitled to permanent disability benefits. The parties agree that any permanent disability would be an industrial disability.

5) Whether claimant is entitled to medical expenses as set forth in Exhibit 15.

6) Whether claimant is entitled to reimbursement of an independent medical examination (IME) under Iowa Code section 85.39.

7) Taxation of costs.

FINDINGS OF FACT

At the time of the hearing, claimant Kaleb Holsinger was 22 years old. He did not graduate from high school, but did obtain his G.E.D. in December, 2011. I find that claimant provided credible testimony.

Claimant asserts that he sustained an aggravation of a pre-existing inguinal hernia on December 10, 2013, which arose out of and in the course of his employment with Exide Technologies. Defendants disagree.

Claimant testified that after he was hired by Exide Technologies in the summer of 2013, that he was in training for about 3 months, during which time he had substantial assistance with his job. At the conclusion of his training, he was doing all of the lifting and carrying by himself. He testified that he was regularly lifting 40 to 150 pounds. He stated that after he began doing his job without assistance, he noticed his hernia was bulging and enlarged, beyond what it had been in the past, and had become painful. (Testimony)

Claimant was diagnosed with a left-sided inguinal hernia at approximately 4 years old. (Exhibit 5a, pages 17-18) On August 6, 2008, claimant was seen by his primary medical care provider, Amber Collum, PA, who stated to claimant and his mother (claimant was about 14 years old at the time) that although the inguinal hernia was asymptomatic at that time, that if "he starts to develop pain, he will need to see [a] surgeon." (Ex. 5a, p. 18) Claimant testified that he understood that increasing his activity would also increase the probability that his hernia would become symptomatic. (Testimony) However, claimant also testified that during high school, he ran on the cross-country team and experienced no problems with his hernia from that activity. He further testified that prior to his work injury, despite several labor intensive jobs, he did not have significant problems with his hernia. (Testimony)

After leaving high school, claimant worked several short term jobs. He initially worked with his father at Unlimited Construction as a laborer. He did not perform skilled tasks, but worked as a helper. He retrieved materials and tools as needed, lifted, carried and held material in place. Claimant testified that this job required lifting of 75 to 100 pounds daily and sometimes up to 150 pounds, with a substantial amount of

bending and twisting. Claimant testified that although he earned $20.00 per hour, the work was not steady and he sought other employment after a few months. (Testimony)

Claimant then worked at Go-America beginning January 2012 for about 3 months as a cashier. This job also required that he stock shelves, which would include lifting up to 25 pounds and twisting and bending. He earned $8.25 per hour. (Testimony)

Claimant next worked for Energy Manufacturing beginning in the summer of 2012 for about 3 months as a painter's helper. This job involved cleaning and handling hydraulic cylinders to prepare them for the painting process. Claimant testified that the cylinders weighed about 75 to 110 pounds and that he would lift them on a regular basis. He earned $13.75 per hour in that position. (Testimony)

Claimant testified that after the work injury, he did not believe that he could perform his former jobs at Unlimited Construction or Energy Manufacturing due to the lifting requirements. However, he did believe that he could still do his former job at Go-America.

Claimant then began working for the defendant, Exide Technologies, in the summer of 2013, as a "post-burner." He voluntarily resigned from this position on December 16, 2013. In this job, he was required to secure battery posts on batteries that weighed between 40 and 150 pounds. After he put the posts on the battery, he would put them on a pallet. However, if the battery had a defect, he would remove the battery from the line and carry it about 30 feet to the re-work station, and then after the defect was corrected, he would carry it 30 feet back to his station and put the posts on the battery. He earned $17.50 per hour. Claimant testified that he resigned from this job, because he felt that he could no longer do the lifting that was required following his injury. (Testimony)

After leaving Exide Technologies, claimant began working for Center Pointe Travel Plaza in January 2014 as a janitor cleaning restrooms, mopping floors and stocking shelves. Claimant worked in this position "off and on" for about three to six months. (Testimony) This job required some lifting and twisting and bending. He earned $9.30 per hour.

Claimant then obtained employment at Cargill as a feed house operator. He continued to work in this position at the time of the hearing. His job at Cargill involves some lifting, but he stated that most of his time is spent at a computer desk. Claimant testified that he lifts no more than 25-30 pounds on a regular basis, and lifts no more than 30 pounds occasionally. He earns $25.01 per hour at Cargill, about $5.50 more per hour than he earned at Exide Techonologies. (Testimony)

Prior to the claimed work injury, claimant treated with Amber Collum, PA-C, as his primary medical care provider for general physical and mental health concerns. (Testimony) As stated above, on August 6, 2008, at about age 14, claimant was seen by Ms. Collum concerning his hernia, which was asymptomatic at that time. (Ex. 5a, pp. 17-18) After August, 2008, through the summer of 2013, the multiple medical records concerning treatment with Ms. Collum involve no discussions regarding

claimant's hernia and support his testimony that he did not have problems with it during that time. (Ex. 5a, p. 20-45) This is true even though claimant reported back pain and concerns about "a new job that requires a lot of lifting," on October 23, 2012. (Ex. 5a, p. 40) Also, on July 9, 2013, claimant complained of abdominal pain, which was diagnosed as kidney stones and did not involve his hernia. (Ex. 5a, pp. 42-45) Not until December 10, 2013, does claimant's hernia concerns appear in Ms. Collum's records. (Ex. 5a, p. 46) At that time, claimant advised Ms. Collum that his hernia "never bothered him at all until recently," and that he:

> [n]ever had any pain in that region. However started working at Exide approximately 6 months ago and does a large amount of lifting. He lifts 150# batteries on a regular basis at work. Approximately 3 months ago he started developing a very large bulge in the left inguinal area and now has a large amount of pain with any lifting or straining.

(Ex. 5a, p. 46) Claimant testified that initially, when the hernia enlarged while working for Exide Technologies, it was not painful, and therefore he did not report it to his employer, because he did not know if it was work related. (Testimony) Also, he testified that he initially did not miss any time from work at Exide, when his hernia became enlarged. However, claimant testified that he did not go into work on December 7 and December 9, 2013 due to pain he was having with his hernia. The undersigned notes that December 8, 2013 was a Sunday. (Ex. 8, pp. 124-125) Within a week of the enlarged hernia becoming painful, he went to see Ms. Collum. (Testimony)

On December 13, 2013, Ms. Collum provided claimant with a note taking him off work from December 7, 2013 through December 13, 2013, indicating that he was allowed to return to normal work activities on December 16, 2013. (Ex. 6, p. 93)

Although claimant reported to Ms. Collum that his hernia had not bothered him until recently, claimant was seen by William Wilkinson, M.D. about nine months earlier on September 13, 2012, and discussed his inguinal hernia. (Ex. 5a, p. 46; Ex. 5b, p. 56) At that time, claimant was 18 years old and it is noted that the hernia, "has not bothered him until recently. Occasionally he will have some pain that resolves if he lays [*sic*] down and pushes on the bulge in his left groin." (Id.) Claimant testified that at that time he was "bothered" far more by the appearance of the hernia and that it was not causing him pain and had not increased in size. Rather, he testified that he had become more self-conscious of the bulge and was interested in having it repaired, stating that he knew it was not normal and that he did not like the way it looked. He was offered surgical repair and initially intended to proceed with surgery at that time. (Ex. 5b, p. 58) However, claimant testified that he later chose not to proceed with surgical intervention, because it was not painful and he was told that the hernia repair may not be a permanent fix and the hernia could reoccur post-surgery. Therefore, he testified, that it did not seem worthwhile to proceed at that time. (Testimony)

Claimant testified that prior to working at Exide Technologies, his hernia never caused him to miss any time from work. (Testimony) Claimant passed a

pre-employment physical at the time he was hired at Exide Technologies. The physical evaluation determined that he could function substantially in the heavy work category. (Ex. 10, p. 138)

On December 10, 2013, claimant saw Ms. Collum, who stated that the inguinal hernia is "[c]ertainly most likely . . . work related as he does a large amount of lifting. Especially since it has recently started bothering him. [*sic*] He does not have insurance at this time. Is going to contact his employer to decide if surgical referral is needed." [*sic*] (Ex. 5a, p 46) Claimant testified that this was the appointment at which Ms. Collum advised him that the hernia was work related and that he should report it to his employer. (Testimony)

Claimant, using the regular call-in line for his employer, 563-927-5546, called and left a message on December 10, 2013, that he was "hurt," and would not be at work that day. (Testimony) (Ex. 7, p. 105; Ex. 8, p. 126) The employer's note from December 10, 2013 reflects that claimant called in and reported being "hurt," not that he was ill or that he would be unable to come to work due to personal business, or for some other reason. (Ex. 8, p. 126) Claimant also called another number twice on December 10, 2013, which is 563-927-4501. Claimant testified that he called this number in an effort to talk a live person and be transferred to the human resources manager, Tim Guyer. (Testimony) During his deposition, Mr. Guyer agreed that he did not have a direct number and that to reach him by phone, a person would call the general number of 563-927-4501, where a receptionist would answer and then direct the caller to him. (Ex. 12, p. 146) He also agreed that leaving a message for him would be done on a voice mail system, if he was unavailable. (Ex. 12, p. 144)

Claimant testified that on December 12 and December 13, 2013, he called the employer and reported that he would not be able to come in because of the pain he was having related to the hernia. (Testimony) The records indicate that on December 11, 2013, claimant called in and advised that he would not be at work due to "Dr. note." (Ex. 8, p. 127) The handwritten notes indicating why claimant would not be at work on December 12 and 13, 2013, are indecipherable. (Ex. 8, pp. 128-129)

Claimant called the main number again on December 16, 2013, again trying to reach Tim Guyer. (Ex. 7, p. 105) (Testimony) Claimant stated that he left a voice message for Mr. Guyer, on either December 10, 2013 or on December 16, 2013, stating that he had gone to the doctor and that he had a work injury and he wanted to know how to proceed. He also stated that he left a message on December 16, 2013 that he was voluntarily quitting because he did not feel that he could perform the job any longer. (Testimony)

On December 16, 2013, it is recorded that claimant "quit." (Ex. 8, p. 130) Claimant's personnel information card states on December 16, 2013, claimant "[q]uit – medical issues." (Ex. 10, p. 137)

Tim Guyer testified in his deposition, taken on July 24, 2017, that he worked at Exide Technologies from 2008 to July, 2014, as the "HR manager." (Ex. 12. pp. 142,

144) His duties included attending to employee attendance issues. However, Brenda Saunders, the company nurse, and Julie Christensen, were primarily responsible for handling the workers' compensation claims. (Id.) Mr. Guyer stated that employees were told to contact their supervisor or Ms. Saunders when they had a work injury. (Id.) However, he admitted that, on occasion, employees would report work injuries directly to him. He stated that when that would occur, he would refer those employees on to Ms. Saunders or possibly to Ms. Christensen. (Ex. 12, pp. 145, 147)

Mr. Guyer stated in his deposition that he had no recollection of claimant speaking to him or leaving a voicemail message for him concerning his alleged hernia injury. Mr. Guyer stated that if claimant had contacted him directly, he would have referred the matter to Ms. Saunders. (Id.)

Brenda Saunders, the occupational health nurse at Exide Technologies, testified at the hearing that she had been employed by the defendant for 34 years. Her job involved handling workers' compensation claims, which included filing the first report of injury, coordinating medical care with doctors and physical therapists and administering light-duty assignments. She also was involved at orientation of new employees, and testified that they were instructed to report work injuries to their supervisor or directly to her. She testified that she had no recollection of claimant advising her of a hernia that he claimed was a work injury and she likewise had no recollection of being told by anyone else of the work injury, until completing the first report of injury. (Testimony) The first report of injury in this case indicates that the employer became aware of the work injury on August 28, 2015. (Ex. 17, p. 184) She testified that the date of August 28, 2015, likely related to the date that the employer received the petition filed in this matter. (Testimony)

Following claimant's appointment with Ms. Collum on December 10, 2013, he returned to see her on March 25, 2014, noting that although he no longer worked at Exide, he continued to have pain. (Ex. 5a, p 48) He was referred to Physician's Clinic of Iowa, where he was seen by Kerri Nowell, M.D., who recommended repair of the hernia. (Ex. 5b, pp. 59, 65)

On April 10, 2014, Claimant underwent surgery of a left inguinal hernia repair. (Ex. 5c, p. 84) Claimant testified that during the hernia repair surgery, his bladder was injured. (Testimony) The on-call urologist was called in to complete a bladder repair procedure. (Ex. 5c, p. 86) On April 24, 2014, it is reported that claimant was returning for follow-up post-surgery, which "was complicated by bladder injury and [a] foley catheter remains in place." (Ex. 5b, p. 67) At that time, claimant noted pain on both sides of his abdomen, a lump at the surgery site, and numbness in the groin area. (Id.) A few months later, on June 3, 2014, claimant notes that "[h]e has occasional mild twinges of pain but no other complaints." The surgery site was well healed and he was released to "resume normal activity." (Ex. 5b, p. 73) On the same day a Return to Work Status was issued by the doctor, stating that claimant was released "without restrictions." (Ex. 5b, p. 74)

On March 13, 2015, claimant was seen by Robert Keating, M.D., complaining that since his hernia repair surgery and bladder injury, he has had sharp pains and sensitivity to touch, around the site of the incisions. (Ex. 5b, p. 79) Dr. Keating did not detect a recurrent hernia but suspected neuropathic pain. (Id.) He recommended a CT scan to further investigate a potential recurrent hernia or other anatomic abnormality and Lidoderm patches. If these were ineffective and there was no identifiable anatomical cause, a "referral to the pain clinic would be the next step." (Id.)

On October 6, 2015, claimant underwent an examination with Robin Sassman, M.D. Dr. Sassman is licensed to practice medicine in Iowa, she is a diplomate of the American Board of Preventative Medicine-Occupational Medicine, a certified independent medical examiner, and a certified medical review officer. (Ex. 2, p. 11) Dr. Sassman, after a review of relevant medical records and following a physical examination of claimant, stated that claimant's work at Exide "was a substantial factor in the worsening of his hernia to the point that the surgery was necessary." (Ex. 1, p. 5) Although Dr. Sassman had some recommendations for future treatment she noted that "they are unlikely to significantly change his impairment. Therefore, I would place him at maximum medical improvement as of one year after the date of the surgery, which would be April 10, 2015." (Id.) She then opines that claimant has sustained a 19 percent impairment to the whole person based the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Dr. Sassman relies on Table 609, p. 136, and a placement in class 1, which is 5 percent for the discomfort at the site of the hernia repair and 15 percent based on Table 7-3, p. 151 for the bladder injury. These impairments of 5 percent and 15 percent are combined to arrive at 19 percent whole person. (Ex. 1, p. 6) Dr. Sassman then assigns permanent restrictions of lifting, pushing, pulling and carrying no more than 30 pounds rarely from floor to waist level, occasionally from waist to shoulder and above shoulder height, and he should also rarely bend or twist at the waist.

Claimant testified that although his current job description at Cargill includes the ability to work beyond the restrictions assigned by Dr. Sassman, that he is able to stay within those restrictions by asking for help from others, when needed.

Concerning the date of injury, claimant testified that his hernia was not painful prior to his job at Exide Technologies and did not limit any of his physical activities. He ran cross-country in high school. He was employed in heavy physical labor positions, without missing time from work due to the hernia. After claimant began work at Exide Technologies, and at the conclusion of his training period, he was doing all the lifting required in his job by himself. Claimant was lifting and carrying batteries weighing between 40 and 150 pounds. He noticed that his hernia bulge was growing in size but it was not initially painful. He had the hernia since childhood and understandably was uncertain whether the current condition of his hernia was work related. His hernia became painful and he missed work on December 7, 2013 and December 9, 2013. He also missed work on December 10, 2013, and went to his primary medical care provider, Ms. Collum, who advised claimant that the increase in size and the presence of pain associated with her hernia was related to his employment at Exide.

I find that claimant was aware of the injury and its causal relationship to his employment on December 10, 2013, and the same is therefore the manifestation date of the work injury.

Considering the various witnesses' testimony and the exhibits introduced into evidence, I find that claimant had a left inguinal hernia which had been present since he was approximately four years old. I find that the hernia did not limit claimant's physical activity and aside from bulging, was substantially asymptomatic until shortly before December 10, 2013. At that time, claimant was employed at Exide Technologies in a position that required significant heavy lifting. I find that based on claimant's testimony and the medical record of December 10, 2013, with Ms. Collum, that claimant experienced pain and expansion of his hernia while he was employed at Exide Technologies. I find that claimant saw Ms. Collum on December 10, 2013 because not only had the hernia grown in size, but also had become painful to the point that he reasonably believed he needed medical care. Ms. Collum stated her opinion that claimant's aggravation of his pre-existing left inguinal hernia was likely related to his work at Exide. (Ex. 5a, p. 46) I find that Dr. Sassman agreed that the heavy lifting that claimant performed at Exide was a substantial factor in aggravating his pre-existing left inguinal hernia, such that surgery became necessary.

I therefore, find that claimant sustained an injury, which was an aggravation of a pre-existing inguinal hernia, that arose out of and in the course of his employment with Exide Technologies.

Considering the issue of notice, I find that claimant clearly knew that his left inguinal hernia predated his commencement of employment at Exide Technologies, and as such it was reasonable that claimant was initially uncertain whether the aggravation was work related. I have found above that claimant was told by Ms. Collum on December 10, 2013, that his left inguinal hernia was related to his work at Exide and the same date is the manifestation date of the injury. I now further find that claimant contacted his employer and reported this claimed work injury between December 10, and December 16, 2013. I specifically find that claimant left a message for the human resources manager, Mr. Guyer on or before December 16, 2013, advising that he believed he had a work related injury involving his hernia. This is based on claimant's credible testimony and is supported by the company records showing that claimant called in reporting that he was "hurt" and that he quit his job due to "medical issues." (Ex. 8, p. 126; Ex. 10, p. 137) Further, the medical record of Ms. Collum states that the matter was work related and claimant intended to contact the employer regarding the matter. (Ex. 5a, p. 46)

Claimant voluntarily quit his employment on December 16, 2013. He was in pain as shown by the fact that he missed work beginning December 7, 2013. He was without medical insurance, and was told by his primary care provider that the matter was a work related injury. His medical provider noted that he intended to contact his employer to seek authorization for surgery. The documents and claimant's credible testimony that he called his employer on multiple occasions and on multiple days, leads the undersigned to the conclusion that claimant did, in fact, provide notice to his

employer within 90 days of the date of his work injury of December 10, 2013, that he sustained a work injury at Exide Technologies and that he sought medical treatment.

I have considered Mr. Guyer's and Ms. Saunders' testimony. I have no doubt that both relayed their recollection to the best of their ability, stating that they did not recall being advised of claimant's work injury in December 2013. However, I find the testimony of claimant and the documentary evidence as stated above to be more persuasive. It is noteworthy that the events in question occurred more than three years prior to Mr. Guyer's deposition and the hearing in this matter.

Claimant asserts a claim for temporary total disability from April 10, 2014, through June 3, 2014. (Hearing Report, p. 1) Claimant was employed at Center Pointe Travel Plaza when he underwent surgery on April 10, 2014, to repair his hernia. (Testimony) (Ex. 1, p. 3) Claimant was off work following surgery, due in part to the bladder injury that occurred during the hernia repair. (Ex. 5c, p. 84; Ex. 5c, p. 86) He was then released to return to work without restrictions on June 3, 2014. (Ex. 5b, p. 74)

Based on the evidence presented, I find that from the date of claimant's surgery on April 10, 2014 through June 3, 2014, he did not reach maximum medical improvement (MMI), was not returned to work, nor was he medically capable of returning to the type of employment he had at the time of the injury, until he was released without restrictions as of June 4, 2014. I therefore find that claimant is entitled to temporary total benefits from April 10, 2014 through June 3, 2014.

Claimant testified that at the time of the hearing, he continued to have pain in the area of his surgery. He stated that if he eats too much, it feels like his hernia is going to rupture. He noted that if he gets up quickly from lying on the floor that he has a sharp pain in the area of the hernia. He also noted that having pressure on the surgery site causes pain. In regards to his bladder, he has frequent urination and a dull pain when his bladder is full. He now intentionally reduces his liquid intake to combat the problem of frequent urination.

Claimant passed a pre-employment physical with Exide Technologies, demonstrating that he was capable of working substantially in the "heavy" work category. (Ex. 10, p. 138) Following surgery, and claimant's release to return to work he passed another pre-employment physical with Cargill, which again demonstrated an ability to work in the "heavy" labor category. (Ex. 14, p. 160)

Claimant testified that prior to this injury, he spent four to six weekends per year cutting and splitting wood, but that he now engages in this activity only one to two times per year and moves slower than he did before. He also previously enjoyed running one to two times per week, but stated that he no longer runs after the surgery because of the irritation to the surgical site and what he described as "spasms" that cause him run with his muscles tense, inhibiting his normal gait. (Testimony) Claimant stated that due to frequent urination, he often wakes up at night about every two hours. The undersigned was not presented with any medical opinion regarding the cause of these spasms, but claimant testified that they did not occur prior to the surgery.

Claimant advised Dr. Sassman during his IME that the Lidoderm patches prescribed by Dr. Keating help a "little" and that he was not currently taking any prescription medication for this work injury and had no scheduled medical appointments concerning the work injury. (Testimony) (Ex. 1, p. 3)

Claimant testified that he did not believe that he could do his previous jobs after the injury, at Unlimited Construction, Energy Manufacturing, Exide Technologies, or Center Pointe Travel Plaza, because of the lifting, twisting and bending that was required with each of those jobs. (Testimony) Claimant believed that he would be able to do his previous job at Go-America, where the lifting requirement was 25 pounds or less, even though it also required twisting and bending. (Testimony)

When considering the extent of industrial disability, I note that Dr. Sassman is the only physician to have offered an opinion concerning the extent of permanent impairment, and she assigned a 19 percent whole person impairment. (Ex. 1, p. 6) She has also assigned restrictions limiting claimant to lifting up to 30 pounds rarely from floor to waist and 30 pounds occasionally from waist to above shoulder height, as well as rarely bending and twisting at the waist. (Id.) Claimant testified that he works within these restrictions at his current employment at Cargill. Claimant has a limited education and his work history involves predominantly heavy physical labor. The restrictions assigned by Dr. Sassman will limit his ability to function in the heavy labor category. I also consider claimant's unrebutted testimony of his current symptoms and the affect they have on his activities. However, claimant admits that he presently earns more money than he ever has in the past, and it is clear that he passed a pre-employment physical for both Exide Technologies and for Cargill, indicating that he could function in the heavy work category.

In consideration, of claimant's young age, limited education, the length of the healing period, his earnings before and after the injury, his obvious motivation to obtain and maintain employment and Dr. Sassman's assessment of permanency, along with all other appropriate factors for consideration of industrial disability, I find that claimant has sustained a 20 percent industrial disability concerning the December 10, 2013 work injury.

Claimant testified that the medical treatment he received was ultimately helpful in treating his condition, despite the bladder injury that occurred during the hernia repair surgery.

Claimant asserts a claim for medical benefits as identified in Exhibit 15. I find from the medical records and claimant's testimony that the medical expenses listed therein relate to the treatment claimant received as a result of the aggravation of the hernia condition. Defendants did not authorize treatment and relied upon their notice defense. I find that claimant provided testimony that the medical treatment he received was beneficial in treating his condition and that the outcome from the treatment was more beneficial than the lack of medical care provided by defendants.

Claimant also asserts a claim for reimbursement of Dr. Sassman's IME under Iowa Code section 85.39. The exhibits and testimony presented lead the undersigned to find that defendants did not authorize medical treatment for claimant, instead relying on their notice defense. Therefore, I find that there was no evaluation of permanent disability by a physician retained by defendants prior to the IME performed by Dr. Sassman.

CONCLUSIONS OF LAW

The first issue is whether claimant sustained an injury that arose out of and in the course of his employment with defendant employer.

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).

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 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.

I have found, as described above, that claimant sustained an injury, which was an aggravation of a pre-existing inguinal hernia, that arose out of and in the course of his employment with Exide Technologies. This determination is based on the opinions of Ms. Collum and Dr. Sassman, the documentary evidence presented and the credible testimony of claimant.

The second issue is whether the employer had notice of the injury within 90 days of the date of the occurrence of the injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

I have found above that claimant did provide notice of the work injury to his employer within 90 days as required by Iowa Code section 85.23. This determination is

supported by claimant's credible testimony and the documentary evidence, including, but not limited to, claimant's phone records, the December 10, 2013, medical record from Ms. Collum, the employer's notes concerning claimant calling in "hurt" and quitting due to "medical issues." (Ex. 8, p. 126; Ex. 10, p. 137) These things taken together support the conclusion that claimant provided notice as required by Iowa Code section 85.23.

The next issue is whether claimant is entitled to temporary disability benefits from April 10, 2014 through June 3, 2014.

Healing period compensation described in Iowa Code section 85.34(1) is 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.

Claimant underwent surgery for hernia repair on April 10, 2014, and during that procedure, his bladder was injured and required repair. I have found that claimant was off work following the surgery through June 3, 2014 and was returned to work on June 4, 2014.

When treatment for a compensable injury leads to additional injury, disability for the additional injury is causally related to the work injury. Hoover v. Iowa Dept. of Agriculture, II-2 Iowa Indus. Comm'r Dec. 565.

In the case at bar, the time off work whether directly related to the hernia repair itself, or due to the injury and repair of the bladder, remains compensable based on the evidence presented. Claimant is entitled to temporary total benefits from April 10, 2014 through and including June 3, 2014.

The next issue is whether claimant is entitled to permanent disability benefits. The parties agree that if any are found, the permanent disability would be 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, 593; 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.

However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

I have found above for the reasons there stated that claimant has sustained a 20 percent industrial disability concerning the December 10, 2013 work injury.

The next issue is whether claimant is entitled to reimbursement of medical expenses as set forth in Exhibit 15.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the

physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that the medical expenses for which claimant seeks reimbursement were based on treatment that was reasonable and beneficial and provided a more favorable outcome than the lack of care provided by defendants. Defendants shall reimburse the requested medical expenses identified in Exhibit 15.

The next issue is whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for

reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I have found above that the exhibits and testimony presented do not indicate that there was any evaluation of permanent disability by a physician retained by defendants prior to the IME performed by Dr. Sassman. Therefore, claimant is not entitled to reimbursement under Iowa Code section 85.39.

The last issue is the taxation of costs, which is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter, as follows:

Claimant provided a statement of costs at Exhibit 16, which includes the IME with Dr. Sassman, in the sum of $3,170.00. There is no attached itemization distinguishing between the portion of the expense associated with preparing the report and the portion attributable to the examination.

Rule 876-4.33 provides for "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." The Iowa Supreme Court in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, at 846-847 (Iowa 2015) has made it clear that the examination that may be associated with a report is not properly taxable as a cost.

Therefore, because there is no itemization for the expense associated with Dr. Sassman's evaluation and report, in my discretion, I award one thousand fifty-six and 66/100 dollars ($1,056.66), which is one-third of the total expense as a reasonable portion attributable to the preparation of the report, and exclude the remainder.

Claimant seeks costs for obtaining medical records. Rule 876 – 4.33 does not provide for taxation of costs for medical records, therefore these costs are excluded.

Claimant seeks costs for the expense of obtaining a transcript of claimant's deposition. Said deposition was not submitted as evidence or used in the course of the hearing and is excluded.

Claimant seeks costs associated with filing fee of $100.00 and the deposition transcript cost of $40.00 for Tim Guyer's deposition, which was included at Exhibit 12. These costs are appropriate under rule 876 – 4.33 and are taxed against defendants.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant healing period benefits for the period from April 10, 2014 through and including June 3, 2014.

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability beginning with the stipulated commencement date of June 4, 2014.

All weekly benefits shall be paid at the stipulated rate of five hundred fifty-two and 90/100 dollars ($552.90).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30.

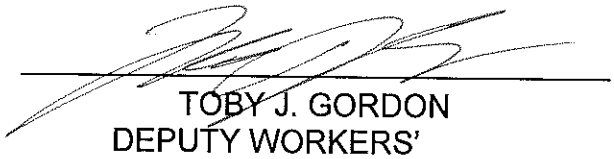
Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all weekly benefits paid to date.

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in the Exhibit 15 and shall pay, reimburse, and/or otherwise satisfy all remaining medical expenses contained therein.

Costs are taxed to the defendants as set forth above in the sum of one thousand one hundred ninety-six and 66/100 ($1,196.66).

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 23rd day of May, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
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TJG/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.