BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK C. BJORKLUND, Claimant, vs. CUMMINS FILTRATION, INC., Employer, Self-Insured, Defendant.	:	File No. 5048043 ARBITRATION DECISION Head Note No.: 1800; 1803; 1108; 1400; 1802; 3701

FILED
JUN 05 2015
WORKERS' COMPENSATION

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Mark C. Bjorklund, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 28, 2013. Claimant eventually alleged he sustained a work-related injury on February 3, 2010 and/or February 11, 2010. (Original notice and petition.)

Defendant, Cummins Filtration Inc., was self-insured for purposes of workers' compensation. Defendant denied the occurrence of the work injuries.

The hearing administrator scheduled the cases for hearing on July 24, 2014 at 8:00 a.m. The hearing took place in Iowa Falls, Iowa. The undersigned appointed Ms. Alyssa Klaver, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Dana Wilker, the health, safety, and environmental leader at Cummins Filtration testified for defendant.

The parties offered exhibits. Claimant offered exhibits marked 1 through 64. Defendants offered exhibits marked A through T. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filed on August 11, 2014. The cases were deemed fully submitted on that date.

It is important to note that from September 9, 2014 through February 15, 2015, Governor Branstad had appointed the undersigned, acting workers' compensation commissioner. This deputy was unable to write the decision during that time frame.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained injuries on February 3, 2010 and February 11, 2010, which arose out of and in the course of his employment;
3. Defendants have waived any affirmative defenses they may have had available;
4. Claimant is entitled to a credit for benefits paid prior to the date of the hearing; and
5. The parties are able to stipulate to the costs allowed by law.

ISSUES

The issues presented are:

1. Whether the work injuries are a cause of temporary and or permanent disability;
2. Whether claimant is entitled to healing period benefits for a period of time;
3. Claimant maintains he is entitled to healing period benefits for the period from June 30, 2010 through September 30, 2010;
4. Whether claimant is entitled to permanent partial disability benefits and if so, the nature of those permanency benefits; and
5. If claimant is entitled to permanency benefits, the extent of those benefits;
6. There is an issue as to the proper weekly benefit rate; claimant states the weekly benefits rate is $532.18 per week and defendants maintain the proper weekly benefit rate is $515.01 per week;
7. Claimant seeks payment of medical expenses including medical mileage; and,
8. Claimant is seeking penalty benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of both, and after reading the evidence, and the post-hearing briefs makes the following findings of fact and conclusions of law:

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

Claimant is a 61 year old married father of two adult children. He is morbidly obese and suffers from type II diabetes mellitus. For years, claimant has been attempting to get his blood sugars and weight under control. Unfortunately, he has been unsuccessful in his efforts.

Claimant resides in Lake Mills, Iowa. It is a small town of 2,140 residents in Winnebago County, Iowa near the Minnesota border. Claimant has a high school diploma and some on the job training. Claimant testified he was in good health prior to his employment with Cummins Filtration, Inc. However, the statement was not entirely accurate.

At some point in time, claimant had hypertension, hyperlipidemia, type II diabetes, he was overweight, suffered from sleep apnea for which he had a C-pap machine. Nevertheless, he refused to wear the equipment at night, despite repeated advice to use the machine. Consequently, claimant repeatedly reported fatigue to his personal physicians.

According to John Kuhnlein, D.O., M.P.H., claimant's independent medical examiner:

> While unrelated to his workers' compensation claim, Mr. Bjorklund does have untreated sleep apnea. He apparently has a CPAP machine but does not use it. Sleep disorders have been implicated in maintaining chronic musculoskeletal pain, and so, in treating Mr. Bjorklund overall, managing his sleep disorder may also benefit his chronic musculoskeletal pain. However, clearly treatment for the sleep disorder would not be related to this work injury. Treating his sleep disorder produces many other benefits besides musculoskeletal pain, and treatment for the sleep disorder would not be primarily related to the work injury.

(Ex. 42, p. 10)

Claimant was employed at Diesel Service as a "filler" for parts. Seventy percent of the job involved walking. Claimant sustained an injury to his left knee. Surgery was warranted. Claimant testified in his deposition he was paid some weekly benefits and he was paid a lump sum settlement to close his file. (Ex. P, pp. 12-16) Claimant did not recall the exact dollar amounts.

From 1986 through 1994, claimant worked for Osmonics. (Ex. P, p. 25) Claimant built Tonka flow pumps. (Ex. P, p. 25) He worked at a bench assembling pumps which weighed from 10 to 35 pounds. Claimant used a mechanical hoist to lift the large pumps. (Ex. P, p. 26) He sustained a work injury while he was employed at Osmonics. (Ex. P, p. 29) The work injury affected claimant's back.

The first spinal surgery was performed on August 31, 1991. It was described as a right L4-5 hemilaminectomy, right lumbosacral laminectomy and discectomy and repair of dural tear. (Ex. A, p. 105). The second spinal surgery was performed on September 30, 1991. It was described as a L5-S1 hemilaminectomy/laminectomy enlargement and pseudomeningocele repair. (Ex. A, p. 107). The third surgery occurred on October 28, 1993. It was characterized as a left L5-S1 lumbar microdiscectomy, repeat procedure. (Ex. 5, p. 1) Subsequent to the third surgery, claimant was placed on light duty. He worked in the office. (Ex. P, p. 9) Claimant never returned to full duty work at Osmonics. (Ex. P, pp. 29-30) He did receive some type of workers' compensation settlement but claimant's recall of the matter was poor. Claimant voluntarily quit Osmonics because he wanted to return to live in Lake Mills, Iowa. (Ex. P, p. 33)

After claimant returned to Iowa, he commenced employment as a temporary worker for the City of Lake Mills, mowing the grass. The work was seasonal only. (Ex. P, pp. 33-34) Next, claimant worked for Winnebago Industries for approximately two years. He installed large awnings on the mobile units. (Ex. P, p. 34) Claimant testified during the course of his employment at Winnebago, he would suffer pain in his legs because of the standing and walking he was required to perform. Claimant testified he left because he was experiencing pain in both knees. (Ex. P, pp. 36-39) The job adversely impacted claimant's health.

From Winnebago Industries, claimant went to Fleetguard, the precursor of Cummins Filtration. The company hired claimant on September 27, 1997. Claimant worked primarily as a press operator in Department 04 and as a production assembler in Department 06. Job descriptions for each position are set out in their entirety in exhibit 48. Those descriptions are incorporated herein as fully described.

On November 13, 2008, claimant presented to the Albert Lea Medical Center with complaints of low back pain of two months duration. (Ex. 7, p. 2) Claimant reported the pain was so severe at times, he could not even walk. He also stated the pain radiated into his buttocks and down both legs. (Ex. 7, p. 2) Claimant admitted he had been taking his spouse's hydrocodone at the rate of two per day. (Ex. 7, p. 2) Claimant stated he had neuropathy in his lower extremities secondary to diabetes. (Ex. 7, p. 2) Mieca Valen, R.N., C.N.P., diagnosed claimant with "Low back pain." (Ex. 7, p. 3)

Claimant returned to the clinic on December 11, 2008 after he had been snowblowing. (Ex. 7, p. 5) The back pain was moderate in degree. (Ex. 7, p. 5) Luis A. Martinez, M.D. prescribed Vicodin and Flexeril. (Ex. 7, p. 6)

On March 13, 2009, claimant complained to Eun Jong Kim, M.D., of low back pain and bilateral thigh pain since March 9, 2009. (Ex. 7, p. 7) There was no significant incident that caused the back pain. (Ex. 7, p. 7) Dr. Kim opined claimant had "re-aggravated low back pain..." (Ex. 7, p. 9) Dr. Kim ordered physical therapy, pool therapy, MRI testing, Tizanidine and Tramadol. (Ex. 7, p. 9)

MRI test results showed:

1. Distant previous L5 laminectomies

2. Prominent endplate spondylosis with bony ridging causing pressure on the thecal sac at L5-S1

3. Degenerative disc disease

(Ex. 7, p. 11)

Claimant returned to Dr. Kim on March 16, 2009 with renewed complaints of lumbar pain with walking. (Ex. 7, p. 12) Dr. Kim removed claimant from work for two weeks, and the physician prescribed 30 Vicodin 5/500 mg 1 tablet twice per day for severe pain. Claimant had the prescription filled at Redinger Pharmacy in Lake Mills, Iowa on March 16, 2009.

Twelve days later, claimant visited Dennis Colby, D.O. Claimant was new to the clinic where Dr. Colby practiced medicine. Claimant reported low back pain radiating down to his knees. Claimant reported the onset of the pain had occurred nine months prior to claimant's visit to the clinic. (Ex. A, p. 101) Dr. Colby diagnosed claimant with:

1. Spondylodesis L5/S1.

2. Thoracic spasm.

3. Somatic dysfunction, thoracic lumbar.

(Ex. A, p. 101) The physician recommended a second opinion from the Twin Cities Spine Institute. Claimant wanted to consider the referral before the doctor made it. (Ex. A, p. 101)

Dr. Colby prescribed 100 Hydrocodone 10/500 tablets. Claimant had the prescriptions filled on March 28, 2009 at Redinger Pharmacy. (Ex. C)

On March 30, 2009, claimant returned to Dr. Kim. Claimant requested a surgical consultation. (Ex. 7, p. 15)

Francis Denis, M.D., examined claimant for a surgical consultation on April 6, 2009. (Ex. 8, p. 1) On May 1, 2009, claimant underwent his fourth spinal surgery. It was an anterior spinal fusion, L4-L5, L5-S1, with Syn-Cage cancellous allograft followed by posterior spinal reconstruction L4 to the sacrum with Legacy instrumentation decompression, L4-5. (Ex. 8, p. 21)

Claimant was off work for a period of time. He collected short-term disability benefits because the surgery was not related to any work injury at Cummins. Claimant applied for Social Security disability benefits, but he was denied those benefits by the Social Security Administration.

Claimant returned to Dr. Denis for a follow-up examination on June 15, 2009. Claimant reported no back pain. There were some mild thigh discomfort and some mild swelling of the left leg. (Ex. 8, p. 24) The fusion was not solid and claimant was to remain off work. (Ex. 8, p. 24) Claimant reported taking 2 to 3 Vicodin per day. (Ex. 8, p. 24) Claimant wore his back brace every day. (Ex. 8, p.24)

On July 27, 2009, claimant again returned to Dr. Denis for a three month post-surgical examination. The fusion was not completely solid. Claimant reported no back or leg pain. (Ex. 8, p. 28) Claimant was advised to wear his brace for one more month on a full time basis. Effective September 1, 2009, claimant could remove the brace when sleeping and walking. (Ex. 8, p. 28)

Dr. Colby continued to prescribe Hydrocodone/APAP 10/500 for claimant after he was evaluated by Dr. Denis and while he was recovering from his fourth surgery. From April 6, 2009 until claimant's return to work in November 2009, claimant filled prescriptions for 100 tablets of Hydrocodone on April 16, 2009, May 27, 2009, June 13, 2009, July 7, 2009, August 1, 2009, August 29, 2009, September 26, 2009 and October 30, 2009. The total sum of pills equated to 800 Hydrocodone over a seven month period of time. (Ex. C, p. 1)

On November 12, 2009, Dr. Denis released claimant to return to work without any restrictions. (Ex. 11, p. 1) Claimant's fusion had "progressed nicely". (Ex. 11, p. 1) Claimant was asked to schedule an examination within one year. (Ex. 11, p. 2)

Members of management for Cummins filled claimant's position as a press operator while he was off for his back fusion. Claimant returned to work on lines two and three during the week ending November 22, 2009. (Ex. F, p. 1) Claimant had performed the same type of work prior to becoming a press operator.

After his return to work but prior to his work injuries, claimant continued to fill his prescriptions for Hydrocodone. (Ex. C, p. 1) He obtained 100 Hydrocodone each on November 27, 2009, December 31, 2009, and January 28, 2010. (Ex. C, p.1) The prescriptions were all filled at Redinger Pharmacy. (Ex. C)

Claimant testified at his arbitration hearing he was not taking any pain medication when he returned to work in November 2009. During cross-examination, claimant testified about the circumstances surrounding the filling of his Hydrocodone prescriptions.

Q. There's one thing I want to get clarified right up front, and that is the circumstances of your filling the prescriptions for hydrocodone.

A. Yes.

Q. It's been admitted into evidence, Defendant's Exhibit C, which was actually produced by your attorney, from Redinger Pharmacy. And it says Mark Bjorklund at the top, and it's purported to be your - - basically a history of your prescriptions at that Redinger Pharmacy.

A. Yes.

Q. Okay. Is that your understanding?

A. Yes.

Q. Okay. And if you look at the top of page 1 of Exhibit C, the first entry is March 16th of 2009; is that correct?

A. Yes.

Q. And I - - It's hard to read, but as I read it, and - -

MS. ARMSTRONG: Can you pull it closer?

MR. BOOK: Oh, sure.

THE WITNESS: I'm fine.

BY MR. BOOK:

Q. As I read it, March 16th - - Well, that first column is the date the prescription is filled.

Is that your understanding?

A. Yes.

Q. Okay. And that particular prescription was from Doctor Kim, and you've already talked about that prescription; correct?

A. Right.

Q. And the next prescription is March 28th, 2009.

A. Yes.

Q. And that's one from Doctor Colby?

A. Yes.

Q. And you visited with Doctor Colby in March of 2009; is that correct?

A. Yes.

Q. And he actually upped your dosage; is that correct?

A. Yes.

Q. Okay. And to shorten it up, I'll just - - it appears to me that you were getting prescriptions filled about once a month for 100 pills of hydrocodone from March of 2009 through the date of your injury at Cummins in February of 2010; is that correct?

A. Yes.

Q. And if you do the math - - and I tried to do the math - - it works out to slightly more than three pills of hydrocodone a day; correct?

A. Yes.

Q. So that's over - - In ten months or so, that's 1,000 pills of hydrocodone.

Now, correct me if I'm wrong, but I thought you testified at the beginning of the hearing that you did not have a prescription for hydrocodone prior to the work injury at Cummins?

MS. ARMSTRONG: Objection. I'm not sure that was his testimony.

MR. BOOK: Well, that's my recollection. The testimony and the record will stand on its own.

BY MR. BOOK:

Q. Was that a mistake when you said that?

A. I - - Must have been. I don't remember that.

Q. You also indicated that you were getting your hydrocodone from your sister.

Was that a mistake when you said that?

A. It surely was because my sister has nothing to do with this.

Q. Who were you giving the - -

DEPUTY COMMISSIONER: No, I think he said his wife.

BY MR. BOOK:

Q. Oh, I'm sorry. I made a mistake.

You said you got it from your wife?

A. Yes.

Q. Okay. So then you later testified that you were filling these prescriptions so you could give hydrocodone to somebody else?

A. Yes.

Q. Who were you giving it to?

MS. ARMSTRONG: Objection.

THE WITNESS: Objection, I - -

MS ARMSTRONG: You know, he - -

MR. BOOK: Objection based on what?

MS. ARMSTRONG: The Fifth Amendment.

BY MR. BOOK:

Q. So you're pleading the Fifth Amendment? You don't want to incriminate yourself by testifying at this proceeding that you committed a criminal – - you were engaged in criminal activity?

A. Yes.

> Q. Okay. All right. So you're testifying here today that you were not taking any hydrocodone, or you were taking hydrocodone? Because you said two different things.
>
> You said you were taking it - - taking hydrocodone given to you by your wife, but you've also testified that you were filling prescriptions that you then gave to somebody else in violation of federal law.
>
> MS. ARMSTRONG: Objection. I think that completely confuses and misstates his testimony.
>
> MR. BOOK: Okay. The testimony will stand on its own.

(Transcript, pages 79-83)

Claimant denied he was taking any of the Hydrocodone before the February 2010 work injury. Nevertheless, he continually requested the pain medication from Dr. Colby's office. Often, claimant had to call into the clinic, speak with the nurse on duty, and request refills of the pain medication. Either claimant truthfully represented to Dr. Colby there was a need for pain medication and claimant took the Hydrocodone after his fourth spinal surgery and before his work injury on February 3, 2010 or claimant misrepresented to Dr. Colby there was a need for pain medication. Claimant testified at his hearing that he was providing the Hydrocodone to another person. (Tr., p. 82) Despite which version is the accurate one, claimant does not present a credible image of himself. He has either misrepresented his need for pain medication to his personal physician or he has misrepresented himself before this deputy. In any event, claimant's ability to tell the truth has been compromised by his inconsistent statements and actions.

In his deposition, claimant testified he had no independent recollection of the incident on February 3, 2010. He had to be reminded of the event by his attorney who showed claimant the employee incident report for the same date. (Ex. 46) The incident report stated claimant slipped on the ice but did not fall. Claimant tweaked the right side of his back. (Ex. 46, p. 1)

On the day of the slip in the parking lot, claimant presented to the clinic inside the plant but refused ice treatment. (Ex. 12, p. 1) On the following day, he reported to the clinic he was "feeling much better" and his pain level was down. Claimant indicated to Susan P. See, R.N., he had taken hydrocodone and a muscle relaxer at bedtime on the prior evening. (Ex. 12, p. 3)

On February 5, 2010, claimant again presented to the plant clinic. The note for that date states in relevant part:

> S: Mark presents for follow-up to his 1st occ from Wednesday morning. He rates his lower back pain "4" at this time, states sometimes it gets as high as "7". He uses a muscle relaxant and hydrocodone at home, states

> he used naproxen once, but that it was not effective. He states he uses both ice and heat at home.
>
> O: As above. When questioned, he related that he has had some numbness to his [sic] both his lateral thighs, midway down and toward the back. He states this is new since the incident, but it was not present when he first came to the clinic. He is noted to limp/walk stiffly when walking into and out of the clinic today.
>
> A: Alteration in comfort r/t back pain.
>
> P: Iced Mark's back for 15 minutes. Recommended including naproxen regularly to reduce inflammation, Mark not receptive to the idea, stating 'I guess I'm just used to more powerful medications.'. . .

(Ex. 12, p. 4)

Three days later, claimant again presented to the clinic. He reported to the nurse on duty that he had taken Aleve, a muscle relaxant and Hydrocodone for pain. (Ex. 12, p. 5) Claimant was dissatisfied with his pain control. (Ex. 12, p. 5)

Claimant reported his second incident on the date it occurred, February 11, 2010. (Ex. 46, p. 2) Claimant tripped over a dust pan. (Ex. 46, p. 3) He presented to the clinic with soreness and stiffness. (Ex. 12, p. 6) The nurse advised claimant to take Aleve and to use ice every two hours. (Ex. 12, p. 7)

On February 12, 2010, claimant returned to the clinic. He reported, "he took a couple of pain pills, a muscle relaxant, a couple of aspirin, & took a nap on the sofa." (Ex. 12, p. 8) Claimant denied numbness and tingling and said the pain was along the right side of the back. (Ex. 12, p. 8) Later the same day, claimant returned to the clinic with pain shooting up to his neck and down to his buttocks. (Ex. 12, p. 10) Claimant was told to take Aleve and Tylenol for pain control. (Ex. 12, p. 10) Claimant was sent to perform light duty work in the department of human resources. (Ex. 12, p. 11)

On February 15, 2010, claimant reported to the nurse again. The pain had decreased with the use of muscle relaxants and pain pills. (Ex. 12, p. 12) Claimant denied numbness to the buttocks. (Ex. 12, p. 12)

Michael Hambel, MSPT, evaluated claimant on February 17, 2010. Claimant denied radiating symptoms into his legs or arms. (Ex. 12, p. 15) Claimant admitted taking Hydrocodone and muscle relaxants as needed. (Ex. 12, p. 15) Claimant attended therapy on February 24, 2010, March 3, 2010, March 15, 2010, March 17, 2010 and March 24, 2010. (Ex. 12, pp. 16-18) Claimant was discharged from care on March 15, 2010 because he was feeling well. (Ex. 12, p. 19) However, claimant continued to treat at the clinic.

On March 29, 2010, claimant presented to Dennis Colby, D.O., for an examination of claimant's back. (Ex. 14, p. 1) Dr. Colby noted muscle spasms and marked tenderness at the iliosacral junction at the lumbar area. (Ex. 14, p. 1) **Dr. Colby opined claimant's work injury exacerbated claimant's preexisting back condition.** (Emphasis added.) (Ex. 14, p. 1) A copy of Dr. Colby's opinion was forwarded to the clinic at the plant. (Ex. 13, p.9) Defendant gave claimant approval to see his spine surgeon in Minnesota. (Ex. 13, p. 10)

On June 14, 2010, Dr. Denis, examined claimant. Dr. Denis had performed he anterior and posterior spinal fusion on May 1, 2009. Dr. Denis opined:

> This patient may have sustained injury at a disc above the fusion but does not have any significant neurologic compromise in relationship to those.
>
> At this time, he has already had a Medrol Dose Pack. At this time, he would be a good candidate for an epidural steroid injection to be done at L3-L4. This could be done either here at Abbott Northwestern or in Albert Lea as suggested by the QRC. His QRC, Becky Avelar.

(Ex. 16, p. 2)

Dr. Denis also imposed some temporary work restrictions. (Ex. 16, p. 3) The temporary restrictions were:

> Occasional lifting or carrying up to 20 pounds;
>
> Occasional bending;
>
> Occasional twisting;
>
> Occasional siting; and
>
> Occasional standing.

(Ex. 16, p. 3) Claimant related his back pain was an 8 out of 10 and his leg pain was a 6 out of 10. (Ex. 16, p. 5)

On June 25, 2010, L. Paul Broadbent, M.D., administered an interlaminar lumbar epidurography with epidural steroid and local anesthetic injection. The injection occurred at L3-4. (Ex. 20, p.1) The initial response to the injection was no pain relief after 20 minutes. (Ex. 20, p. 1) On July 7, 2010, claimant telephoned the office of Dr. Denis. Claimant reported he had absolutely no relief from the injection. (Ex. 21, p. 1) Dr. Denis restricted claimant from working effective July 12, 2010. (Ex. 21, p. 2)

On June 30, 2010, members of management removed claimant from work because claimant was taking prescription medication for pain. (Tr., pp. 45-47, p.148) Claimant testified his medication interfered with his ability to work safely and efficiently. (Tr. p.47)

Claimant reported to Dr. Colby on July 12, 2010, with "quite severe pain". Dr. Colby prescribed Lyrica. (Ex. 22, p. 1) Dr. Colby wanted claimant to be able to return to work. (Ex. 22, p. 1) The physician hoped the Lyrica could replace claimant's use of Hydrocodone. Claimant reported the Lyrica was not beneficial in reducing pain.

Claimant underwent MRI testing on August 2, 2010. John C. Dooley, M.D. interpreted the results. They showed:

1. Interval posterior fusion L4, L5-S1

2. L5-S1 degenerative spondylosis persists

3. No compromise of thecal sac or malalignment noted

4. Artifact from metallic structures as noted above

(Ex. 24, p. 1)

Claimant met with Dr. Denis on August 5, 2010. (Ex. 25, p. 1) In a chart note for the same date, Kyle Exsted, P.A.-C dictated the following:

> He did have a new MRI obtained on 08/02/10 of the lumbar spine. Dr. Denis reviewed this with the patient. It shows some slight degeneration at the level above his fusion L3-4 with some mild bilateral foraminal stenosis, left greater than right. He also has a presence of a fusion at L4 to the sacrum. The appears solid on both plain x-rays and the MRI, but we cannot be 100% sure of this.

(Ex. 25, p. 1)

On September 24, 2010, claimant underwent a CT scan of the lumbar spine. (Ex. 30, p. 2) Mark E. Meyers, M.D., concluded the results demonstrated:

> CONCLUSION: Postsurgical changes with L4-S1 fusion with the following specific findings:
>
> 1. Solid interbody fusions at both levels with solid dorsolateral bone and facet ankylosis at L4-5 and on the right at L5-S1 with relatively sparse bone on the left.

2. Moderate chronic right subarticular recess narrowing at L5-S1 with encroachment on the right S1 nerve.

3. Moderate central stenosis at the adjacent L3-4 level.

4. No evidence for mass or infection.

(Ex. 30, p. 3)

Claimant returned to Dr. Denis on September 30, 2010. The orthopedic surgeon opined the CT scan confirmed the presence of circumferential bulging at L3-4 with central stenosis. (Ex. 32, p. 1) Dr. Denis recommended another surgery done posteriorly with decompression and fusion at L3-4 with possible TLIF. (Ex. 32, p. 2) Dr. Denis restricted claimant from working, pending the surgery. (Ex. 32, p. 3)

To date, claimant has not undergone the surgery. His blood sugars are too high to undergo the surgery. Repeatedly, claimant has been advised he needs to control his diabetes, and to lose weight. (Ex. 34, p. 1) On certain occasions, claimant uses a cane for balance. No medical provider has prescribed the assistive device. Claimant decided he needed it for his diabetic neuropathy. (Ex. 42, p. 7)

Claimant filed a second time for Social Security disability benefits. Claimant was denied benefits by the Administrative Law Judge, effective January 14, 2013. (Ex. R)

The undersigned reviewed the surveillance video that was taken for the days of June 4, 2014 through June 6, 2014. (Ex. N) The video depicted claimant standing, walking with the use of a cane, walking without the use of a cane, bending at the waist, throwing and catching a baseball with a young child, ascending and descending a few stairs, pushing a shopping cart, entering and exiting a vehicle and driving a motor vehicle. Claimant did not display visible signs of pain behaviors. He appeared to perform his tasks of daily living within normal ranges of movement.

RATIONALE AND CONCLUSIONS OF LAW

For all intents and purposes, these two alleged injury dates are being treated as one injury date, February 3, 2010. Claimant began seeking medical treatment for his back immediately following the first injury. He treated continually for his low back after the initial injury.

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).

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).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1957); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

Dr. Colby, claimant's personal physician, testified by deposition. (Ex. S) The doctor testified claimant's work injury exacerbated claimant's pre-existing spinal condition. (Ex. S, pp. 29-30) Dr. Colby testified the work injury made claimant's pre-existing condition worse. (Ex. S, p. 29) Dr. Colby prescribed Hydrocodone for claimant's pain prior to and after the work injury in 2010. Dr. Colby was under the distinct impression, the Hydrocodone was prescribed for claimant's chronic back pain. Dr. Colby commenced prescribing Hydrocodone in March of 2009 and continued until January 28, 2010. All of the prescriptions pre-dated the work injury on February 3, 2010. The personal physician continued prescribing the same pain medication after the work injury.

Defendants desired an independent medical examination. Charles Mooney, M.D., examined claimant on October 10, 2012. With respect to the issue of medical causation, Dr. Mooney opined:

> ANSWER: The medical records and the medical history provided would indicate that Mr. Bjorklund had an exacerbation of underlying degenerative disc disease of the lumbar spine related to the injury occurring

> approximately 02/03/10. However, the medical records provided do not indicate to any great degree his level of function the time of his return to work (approximately November of 2009) and the level of his treatment or his work restrictions at that time.
>
> It is reasonable to assume that the slip and fall that is described on or about 02/03/10 could have caused an exacerbation of symptoms of this preexisting medical condition; however, the degenerative disc finding at L3-4 is not directly attributable to the injury but is related to his previous fusion. Medical literature would suggest that adjacent disc degeneration and stenosis or (transition syndrome) occurs in 35 to 45% of patients because of ensuing hypermobility of the unfused joint. Various reports include accompanying instability translation and spinal stenosis. This segment degeneration may cause symptoms and require surgery in 30% of patients with cocomitant [sic] conditions including spinal stenosis, herniated discs, and instability and may require treatment even years after successful surgery.
>
> In Mr. Bjorkland's [sic] case, the medical records would indicate that although Mr. Bjorkland's [sic] spine condition was at least stable enough for him to return to work in November of 2009, there is no indication that the findings at L3-L4 did not exist prior to the incidents described. Further, given his extensive history of low back pain and previous surgery it is unlikely that he was pain free prior to the incidents described.
>
> It is my opinion overall based on his presentation, the findings on the MRI, and interpretation of CT myelogram by Dr. Denis that the incident may have temporarily exacerbated the symptoms of this chronically painful condition, but is unlikely to have caused the findings of the L3-L4 disc bulging and subsequent reported stenosis.

(Ex. 38, pp. 7-8)

Later in the same report, Dr. Mooney again discussed causation. He wrote:

> ANSWER: It is my opinion that the incident of 02/03/10 was at most consistent with a temporary increase in Mr. Bjorkland's [sic] pain rather than a permanent aggravation of the underlying disc disease; therefore, it is my opinion that no permanent impairment exists. Further, it is my opinion that a formal pain rating is not applicable to pre-existing chronic multifactorial low back pain.

(Ex. 38, p. 9)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination with Dr. Kuhnlein. The examination occurred on July 1, 2013. Dr. Kuhnlein authored a report with a date of July 24, 2013. In the report, Dr. Kuhnlein discussed causation. He wrote:

> Mr. Bjorklund clearly had pre-existing significant lumbar disease, with multiple surgical procedures in his lumbar spine, including the L4-S1 fusion. That is not really in question medically. In this context, with the fusion, his back pain was gone. His leg pain was gone. He returned to work full duty. The records support this. Mr. Bjorklund relates that he did well until he sustained this specific new injury on or about February 3, 2010, when he tripped over the long-handled dustpan, falling to his buttocks and back.
>
> Mr. Bjorklund does not have radiculopathy; he has a diabetic peripheral neuropathy that accounts for the more distal findings on the examination. The only sensory change that was suggestive was a vibratory change in an L5 distribution, not the L3-L4 distribution, and he had no radicular findings elsewhere with nerve tension signs, or with deep tendon reflexes that could be specifically related to an L3-L4 lesion. The findings were more consistent with diabetic peripheral neuropathy. In addition, he had no response to the epidural steroid injection specifically performed at this level on June 25, 2010, which also supports the argument that this is not simply discogenic pain from the L3-L4 lesion.
>
> Mr. Bjorklund sustained an acute lumbar injury on or about February 3, 2010. In the context of his pre-existing disease, this lumbosacral injury also "lit-up" and aggravated the pre-existing disease based on the record and his statements, which are considered reliable at this point. This February 3, 2010, acute lumbar injury, and the "lighting-up" and aggravation of his pre-existing lumbar disease is related to the February 3, 2010, injury he sustained during the course of employment for Cummins/Fleetguard.
>
> The question could be raised whether ordinary activities would have "lit-up" this disease anyway. That would be a speculative argument. The facts of the matter are that in the timeframe from the surgery through his full-duty return to work, his symptoms did "lit-up" with his normal everyday activities of living. They were only "lit-up" and aggravated after the specific February 3, 2010, injury that occurred at work. As such, the "lighting-up" and aggravation are related to his specific February 3, 2010, work injury.

(Ex. 42, p. 8, 9)

Then there is the opinion from the orthopedic surgeon, Dr. Denis. Initially, Dr. Denis opined, claimant "may have sustained injury at a disc above the fusion but does not have any significant neurologic compromise in relationship to those." (Ex. 16, p. 2) However, after objective testing was performed, Dr. Denis was of the opinion, claimant's work injury had caused a change in claimant's pre-existing spinal condition. (Ex. 32, p. 1)

There is a report from the claims representative, Ms. Debra Williams. She summarized the opinion of Dr. Denis on causation:

> Met with Mr. Bjorklund, his wife and Dr. Denis after they had met independently. Dr. Denis discussed the findings on the CT Myelogram with us, it shows a tear which has caused the disc to protrude and cause pressure on the nerve – Dr. Denis related this was from the fall.

(Ex. 33, p. 1)

It is the determination of the undersigned; the greater weight of the evidence supports the conclusion, claimant's injury on February 3, 2010 aggravated claimant's pre-existing spinal condition. The two treating physicians, Dr. Colby and the orthopedic surgeon, Dr. Denis opined the work injury aggravated the pre-existing condition. Both physicians have had numerous opportunities to examine claimant over the course of several years. Dr. Denis had the opportunity to perform surgery on claimant's spine prior to the work injury in question.

Then there is the opinion of the independent medical examiner, Dr. Kuhnlein. He based his causation opinion on the opinions held by the orthopedic surgeon, Dr. Denis. Additionally, the CT Myelogram of the lumbar spine confirmed the presence of circumferential bulging at L3-4 with central stenosis. (Ex. 32, p. 1)

The only contrary medical opinion is from Dr. Mooney. He did not have all of the relevant medical records prior to his examination of claimant. For example, Dr. Mooney did not have the surgical records of Dr. Denis until December 10, 2013. It is unclear whether Dr. Mooney ever reviewed the September 24, 2010 CT Myelogram which confirmed a tear. (Ex. 32, p. 1) It appears to this deputy, Dr. Mooney had an incomplete medical history when he rendered his opinions about claimant. Therefore, not as much weight is accorded to the opinions of Dr. Mooney as is accorded to the opinions of the other three physicians.

Claimant's spinal injury is an injury to the body as a whole. As a consequence, his disability is to be calculated by the industrial method. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere

'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

The undersigned does not accept claimant's statement he had no pain whatsoever once he returned to work following his fourth surgery. Claimant just had too many prescriptions for Hydrocodone filled at Redinger Pharmacy between the date of his surgery and February 3, 2010. Claimant's testimony that he was securing drugs for some unnamed individual does not seem plausible. It seems more plausible claimant was taking 3 to 4 Hydrocodone per day to manage his own pain. He reported to Dr. Colby and the nursing staff in his clinic there was a continual need for pain medication. The deputy believes claimant needed the medication for himself before the work injury in February.

But for claimant's diabetes mellitus, he would undergo a fifth surgery. Unfortunately, claimant has not been compliant with the advice his endocrinologist has presented to him. Claimant's comorbidities are affecting his ability to have any additional spinal surgery. The spinal surgery would most probably correct the problem at L3-L4. The surgery would not correct claimant's diabetic peripheral neuropathy. That is a condition outside of the work injury but which affects claimant's overall health.

Claimant continued to perform duties for defendant after the work injury until he was told he could not work because he was taking so much Hydrocodone. Even claimant testified the pain medication affected his ability to perform his job. Claimant was sent home on June 30, 2010. Dr. Denis provided claimant a note that stated he was unable to work effective July 12, 2010. (Ex. 21, p. 2) Claimant remains off work because of the pain medication issue and the pending surgery.

Even though claimant remained off work from Cummins, he did perform duties as a volunteer ambulance driver in his geographical area. He continued to volunteer his services on numerous occasions. He was able to complete the tasks assigned to him as a volunteer ambulance driver.

Dr. Colby prescribed some harsh restrictions based on claimant's subjective complaints. Claimant reported he needed to recline for one to two hours after walking with a cane for only 20 to 30 minutes. Dr. Colby, however, did not have the benefit of the surveillance video that was admitted as evidence in the arbitration hearing. Dr. Colby relied on claimant's representations in rendering all work restrictions. (Ex. S, pp. 35-36) The physician relied on claimant's repeated request for narcotic pain medications to control unbearable pain.

Dr. Kuhnlein also imposed work restrictions. The examining doctor opined:

> Given his physical examination, Mr. Bjorklund would be capable of lifting, pushing or pulling 20 pounds or equivalent occasionally from floor to waist and over the shoulder. He could lift, push or pull 30 pounds occasionally from waist to shoulder, as long as weights are kept close to the axial plane of his body. If he is lifting more than an elbow's distance away from his body, he should lift 20 pounds occasionally from waist to shoulder.
>
> With respect to nonmaterial handling, he could sit, stand or walk on an as needed basis, being able to change positions for comfort. He could squat rarely. This restrictions is not only related to the back condition, but also related to his diabetic peripheral neuropathy, and the stability on the peripheral neuropathy in his feet. He could bend at the waist occasionally because of his back condition. He could crawl occasionally because of combination of his back and peripheral neuropathy. He could kneel without restriction. I would suggest that he now work on ladders, primarily because of his diabetic peripheral neuropathy. He can go up and down stairs without restriction. He should work at or above shoulder height on an occasional basis, because of his back condition. He could grip and grasp without restrictions to shoulder height, and occasionally at or above shoulder height. I would suggest that he not operate foot-operated machinery, because of his diabetic peripheral neuropathy.
>
> There are no vision, hearing or communication restrictions. There are no travel restrictions. I would suggest that he use vibratory or power tools at or above shoulder height on an occasional basis related to his back condition. There may be other restrictions related to his diabetic condition but that would not be related to his work injury.
>
> There are no specific environmental restrictions related to his back condition.
>
> There are no specific personal protective equipment restrictions related to his back condition. He could work on production lines, as long as it would be low-speed assembly. There is no particular way to determine what "low speed" would be for Mr. Bjorklund. The intent of this restrictions is to avoid highly repetitive production work, such as seen in meatpacking or

> automotive production. He can work on uneven surfaces related to his back condition. He might have problems with uneven surfaces because of his peripheral neuropathy. Within these limitations, Mr. Bjorklund would be capable of working without hourly limitations.

(Ex. 42, pp. 11-12)

Dr. Kuhnlein's restrictions appear modest and reasonable to the undersigned. Dr. Kuhnlein is well respected in the field of occupational medicine and he is board certified. The undersigned is accepting the restrictions of Dr. Kuhnlein as accurate depictions of what claimant can do in the workplace. This evaluating physician does not preclude claimant from working anywhere. Claimant may even return to certain types of assembly work, although claimant is not allowed to work as a press operator or in highly repetitive jobs. Dr. Kuhnlein rated claimant as having only a 7 percent permanent impairment to the back. This is a very low permanent impairment rating.

Claimant was prevented from returning to work at Cummins for two reasons. Firstly, claimant had been taking 3 to 4 Hydrocodone per day, and secondly, the plant is in the process of moving to Mexico. There are very few employees remaining at the Lake Mills facility. There is no job available to claimant at Cummins.

Therefore in light of all of the evidence; it is the determination of the undersigned; claimant is entitled to permanent partial disability benefits in the amount of 50 percent commencing from September 30, 2010. Claimant is entitled to 250 weeks of permanent partial disability benefits. Defendant shall take credit for all benefits paid prior to the date of the decision.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the issue of healing period benefits. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was taken off work by members of management on June 30, 2010. He remained off work until he reached maximum medical improvement on September 29, 2010. This is a period of 13.143 weeks. Claimant is entitled to healing period benefits

for this same time period. Defendant shall take credit for all benefits paid prior to the date of the decision.

The fourth issue for resolution is the matter of the weekly benefit rate for the injury date of February 3, 2010. The proper weekly benefit rate is calculated as follows:

III THE AVERAGE WEEKLY WAGE AND APPLICABLE RATE OF

COMPENSATION IS AS STATED BELOW

Cummins rate calculations for the February 3, 2010 date of injury is:

Check date	Reg & OT Hours	Vac/Hol/Sick Hours	Total Hours	Rate
1. 1/29/10	56	0	56	$14.85
2. 1/22/10	48.75	0	48.75	$14.85
3. 1/15/10	54	0	54	$14.85
4. 11/25/09	48	0	48	$14.85
5. 3/13/09	40	0	40	$14.85
6. 3/6/09	48	0	48	$14.85
Total Hours:			294.75	

294.75 hours x $14.85/hour = $4,377.03

Bonus: $1,163.76/4 = 290.94

Total earnings 6 weeks: 6 + 290.94 = 4,667.97

AWW: 4,667.97 divided by 777.99

Rate based on M2: $514.43

Therefore, claimant's weekly benefit rate is $514.43. Defendant shall take credit for all weekly benefits paid to date.

The fifth issue deals with medical bills and medical mileage pursuant to Iowa Code section 85.27. Claimant detailed the bills in Exhibit 57. The bills are due to Dr. Colby, an authorized treating physician. The medical bills are causally connected to the February 3, 2010 work injury. Defendant is liable for the costs detailed in Exhibit 57.

Claimant is also making a claim for penalty benefit pursuant to Iowa Code section 86.13(4)(a). If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendant acted reasonably when it paid unto claimant 128 weeks of permanency benefits. Dr. Kuhnlein only provided claimant with an impairment rating of 7 percent. Claimant was removed from work because of his pain medication. Given claimant's long standing history of back problems, defendant acted prudently in paying claimant 128 weeks of permanency prior to the date of the hearing. No penalty benefits are warranted in this case.

The final issue is the matter of costs. Claimant detailed those costs in Exhibit 62. The only costs defendant is not liable for are:

Filing fee "Motion to Amend Petition, Form 100 Amended Petition (2/12/14), $100.00; and

Dr. Colby Conference (6/16/14) $249.00.

Defendant shall be liable for all other costs incurred by claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant two hundred-fifty (250) weeks of permanent partial disability benefits commencing from September 30, 2010 and payable at the weekly benefit rate of five hundred fourteen and 43/100 dollars ($514.43) per week.

Defendant shall also pay healing period benefits to claimant for the period from June 30, 2010 through September 29, 2010 at the weekly benefit rate of five hundred fourteen and 43/100 dollars ($514.43) per week.

Accrued benefits shall be paid in a lump sum, together with interest, according to law.

Defendant shall take credit for all benefits previously paid prior to the filing of this decision.

Defendant shall pay medical benefits and medical mileage as detailed in Exhibit 57.

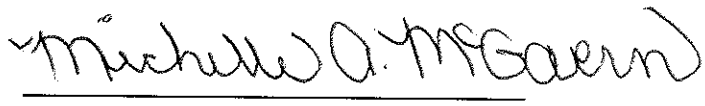
Costs are assessed to defendant as detailed in Exhibit 62 with the exception of:

Filing fee "Motion to Amend Petition, Form 100 Amended Petition (2/12/14), $100; and

Dr. Colby Conference (6/16/14) $249.00.

Defendant shall file all subsequent reports as required by law.

Signed and filed this 5th day of June, 2015.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Jackie D. Armstrong
Attorney at Law
PO Box 679
Mason City, IA 50402
jdarmstrong@iabar.org

Richard G. Book
Attorney at Law
2700 Westown Parkway, Ste. 170
West Des Moines, IA 50266-1411
rbook@desmoineslaw.com

MAM/kjw

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.