BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 07 2015
WORKERS' COMPENSATION

KENNETH STREIT,

Claimant,

vs.

STREIT CONSTRUCTION, INC.,

Employer,

and

EMC INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5043612

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Kenneth Streit, claimant, has filed a petition in arbitration and seeks workers' compensation from Streit Construction, Inc., employer and EMC Insurance Companies, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on January 30, 2015 in Iowa Falls, Iowa. The record in the case consists of Claimant's Exhibits 1 through 7; Defense Exhibits A through D; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

1. Whether the claimant sustained an injury arising out of and in the course of employment on October 13, 2012.

2. Whether the alleged injury is a cause of temporary disability.

3. Whether the alleged injury is a cause of permanent disability.

4. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

5. The extent of the claimant's entitlement to permanent partial disability benefits.

6. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

7. Whether claimant is entitled to reimbursement for an independent medical examination.

FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:

Claimant testified he is 54 years old. He lives in Gowrie, Iowa. On October 13, 2013, he was married and had two children. Both are adults, but on the date of injury they were 17 and 18 years old. His education consists of a high school diploma and one year of technical school, where he studied construction. He completed that course.

He then started his own business with his brother and a partner in 1979. He has worked in construction on a self-employed basis since then. In October 2012, he was working for his company, Streit Construction, of which he is a partner-owner. They had between 7 to 10 employees in 2012, some full and some part time. They did concrete work, shingling, commercial construction, etc.

A typical day would involve going to work early, leaving home by 5:00 or 6:00 a.m. He would load materials at the shop, and when the employees arrived, travel to the work site. There he would work alongside his employees doing the same work, which included lifting, carrying, bending, twisting, etc. He had to lift as much as he could, and at times more than he should lift, up to a couple of hundred pounds. It was common to lift items weighing more than 50 pounds, such as shingles, plywood, sheet rock, and cement forms. He had to bend, crouch and squat frequently, most of the work day. He regularly climbed ladders and scaffolds. He worked with tools above his head, including power tools such as drills, saws, etc. For cement work, he had to get down on his knees into the cement, pushing and pulling, shoveling cement. Being the owner, he often had to go to work even when he was sick, but he enjoyed the work.

Exhibit 4 shows claimant's normal work hours in 2012 and up through May 2014. In October 2012, he was paid every two weeks. The hours column shows the hours he worked in a two-week period. Two-week pay periods at that time show him working 170 hours, 124 hours, and even 200 hours. Claimant stated he enjoyed his work but worked long hours.

In October 2012 a customer, a farmer, needed a bin set up for grain as soon as possible, and claimant worked long hours to meet the deadline. The job involved using cement forms and using re-rod, which is sharp and often involves cuts. The job was dirty, but claimant did not worry about getting dirty at work. He often had cuts and sores

from cutting re-rod, scraping up against dried cement, etc. He also poured concrete at other sites that summer. It was hot and humid. Claimant usually wore a shirt with cut off sleeves in hot weather.

Many evenings claimant would come home from work, shower, throw his clothes into the laundry, watch a little television and then go to bed for the night. His son usually went out for baseball and that would involve claimant going to ball games in the evening, but that summer he did not go out for baseball so claimant was able to work longer hours.

His son, Matthew, was in good physical shape, and out for several sports, including wrestling. Matthew did not have any MRSA infection in 2012 or ever, for that matter, nor did any other member of claimant's family. Any medical note in the records indicating his son had MRSA is in error. Claimant asked his son about this and his son also said that was correct, he never had MRSA.

October 13, 2012, a Saturday, the alleged date of injury, was to be the last day at the grain bin work site. Claimant went there and did the clean-up work, with bending, twisting, taking apart cement forms weighing between 40 and 80 pounds. He worked alone. He got home about dark, exhausted. His back hurt and he was tired as he was every day. It was a hot day and he was ready to come home. He had open cuts that night, as he did all summer long. It was a routine part of his work.

During the night, claimant woke up in excruciating pain all over his body. He could not move his arms. He did not know what was wrong. The pain was sharp and cramping. He could not talk. The cramps were in his leg and back. There was so much pain he cannot say whether one part of his body hurt more than another. He tried to get to his cell phone but it was in a different part of the house. Claimant grew emotional during this part of his testimony.

He had to crawl up the stairs to wake his son for assistance. Claimant was taken to the hospital in Fort Dodge. He recalls blood being drawn, some tests, and perhaps an injection for pain. He was then sent home early the morning of Sunday, October 14, 2012. He was still in pain but the medication helped.

When he went home, he was still in pain, mostly in his back. He thought he had perhaps thrown his back out, although he had done nothing at work to suggest that. He had never experienced pain like that. He had never been to a hospital or even to a doctor much, as he was a healthy person. He had never even heard of MRSA before. He had never received any treatment for his back.

On Monday, he tried to go to work but was unable to perform his job and had to go home. The same thing happened on Tuesday. He then had to go back to the hospital. On Tuesday, October 16, 2012, he went to the chiropractor, thinking his back was out of joint. The chiropractor tried manipulation but nothing worked. When he left that office claimant could not even walk.

On October 17, he went back to the emergency room by ambulance with complaints of back pain. On the gurney, his leg fell off to the side and this produced excruciating pain. He had back spasms and cramps in his legs. On October 18, he returned to the chiropractor. His son had to take him to appointments because he could not drive.

He then received a call to return to the doctor in Lake City. He was told he was very sick. His brother took him to Fort Dodge. In the emergency room, he was told the Lake City clinic had not informed the Fort Dodge hospital he was coming. He was given injections and they were going to send him home, but he said he was still in pain. Some further medication did help and he was able to walk out of the emergency room.

On October 19, 2012, he returned to the hospital. He was seen by James Comstock, M.D., who was on call. Exhibit 1, page 21, shows claimant was found to have scattered sores and spots on his arms. He was in the hospital until October 21, 2012. He was then transferred to Iowa Methodist Hospital. His pain was "all over", but he was under heavy medication, including morphine. Exhibit 1, page 38, from Iowa Methodist Hospital shows a note by Sudhir Kumar, M.D., noting sores, lesions and abrasions acquired during work, on his arms and face. Claimant underwent an MRI, which showed an abscess in his lower back and spine, which was drained. During this time, he was also treated by David Boarini, M.D. While in the hospital he was in pain and heavily medicated. He was diagnosed with MRSA septasemia. He was also found to have a couple of herniated discs in his back.

When he was discharged, he felt terrible. He was having trouble walking, eating, and using the bathroom, but they sent him home anyway. At home, he was alone as his son was in school, so he had to crawl to get to the bathroom or use a walker. He had a PIC line into his arm and up into his chest for medication, which he had to administer himself.

The MRSA improved, but the pain continued, and continues today. It was mostly in his back but also his right leg. The right leg would spasm occasionally as did his back. It felt like a cramp which was very painful. He could not move until the cramp went away. He still gets them today in his leg, once every five or six days. He has to take both hands and squeeze his leg as hard as he can and hope it will go away.

In the winter of 2012-2013, Dr. Kumar noted claimant visiting a nursing home in Algona, Iowa, to visit his uncle. This was long after his onset of symptoms. There were no MRSA infections in his family in 2012. Claimant denied talking to Dr. Kumar about the nursing home, or about his son wrestling, etc., but all this personal information was in Dr. Kumar's report as if they had discussed it.

Claimant was unable to work in the winter of 2012-2013. Formerly, he always worked through the winter alongside his employees. He has never laid off an employee for the winter.

Dr. Boarini provided claimant with an MRI. Claimant was supposed to discuss the results with Dr. Boarini, but Dr. Boarini did not want to talk about it. He would get mad and get up and leave the room. Dr. Boarini's attitude was "well, you're still here". Claimant talked to him about workers' compensation while he was in the hospital. Dr. Boarini told him he probably got the MRSA from the cuts he had. Later, claimant asked him to confirm in writing that his MRSA was work related. He said he would, and that Dr. Kumar would also. But when claimant went to Dr. Kumar, he said he did not even know Dr. Boarini. Claimant feels as soon as workers' compensation was mentioned, both doctors changed their attitude. They appeared they did not want to get involved. After that, their attitude was different when he met with them.

Exhibit C contains letters from Dr. Boarini. One refers to the January 23, 2013, appointment for the MRI. He notes a conversation with claimant about workers' compensation. He also noted he told claimant he would not need to treat him further.

At that time claimant was using a cane, and at times a wheelchair. Claimant went to his son's wrestling meets in a wheelchair, he could not sit in the bleachers.

Claimant attended a pain clinic in Fort Dodge until they terminated his treatment there sometime around September 2014. Claimant was asked to submit a urine test. He told them he had a couple of beers the night before. He was told later he was not to consume alcohol when he was taking Oxycodone. Claimant stated he occasionally drinks beer because the medication does not take the pain away. On February 6, 2014, claimant reported pain in his back and both legs, with the right worse.

Claimant stated he has not been without pain in his low back and both legs since the date of injury. Sitting in a chair makes it worse. His Oxycodone was cut off so claimant has mixed alcoholic drinks to deal with the pain.

Exhibit 1, page 72, shows claimant was treated by a neurologist in Fort Dodge, dated October 29, 2014. This was after claimant completed physical therapy for his back and mostly for the numbness in his right leg, which has gotten worse since March 2014. At that time, claimant was on a ladder at work and his right leg gave out and claimant fell. He tore his right shoulder rotator cuff. He will have surgery for that in the future. He feels he fell because his balance has not been good since the MRSA. He has fallen other times since the onset of MRSA but was not injured. He would just get back up and work. He has had balance issues since the MRSA.

Before October 2012, he never went to a doctor. Since then he goes to a doctor frequently, but it is getting less and less. He has unpaid bills for his treatment.

He no longer works as much as he used to work. He is often too tired. Exhibit 4 shows on page one the hours he worked in 2013. He averaged about 50 hours per week per pay period. On page two, it shows from January to the end of May 2014, he worked an average of about 44 hours per week. For the rest of 2014, his hours were about the same as 2013. He has never been back to the hours he worked in 2012.

He is always moving on the construction sites, and seldom stands still. His injury to his back affects his ability to sit, as he is uncomfortable. His ability to walk is also affected, as his right leg does not want to move and tingles all the time. His leg actually bothers him more than his back now. He is able to get down to kneel or to squat but needs to grab something to get back up. He tries not to lift as much as he used to.

Dr. Kuhnlein recommended he not lift more than 40 pounds, but claimant often does so at work. It takes him longer to lift things now. Pushing and pulling is also affected, as he has less strength. He can no longer carry as much as before. His balance is affected. Getting dressed, putting on socks and tying his shoes are affected adversely as well. He tries not to untie his shoes so he can just slip them back on. His ability to bend and twist is no longer what it was, and he gets a "catch" in his back sometimes when he does bend over. He has lost strength since his injury, as he is tired and wore out. He has less stamina. His sleep is disrupted greatly. He sleeps in his bed very little. He only gets a couple of hours of sleep, wakes up due to discomfort, then gets a couple hours more sleep. This is due to his back and sometimes to his right leg. His doctors told him he has a pinched nerve that causes his leg pain. Before the injury he would work until dark or attend his son's sports activities. After his injury going to his son's activities would be uncomfortable.

Exhibit 4 shows claimant returned to work around April 1, 2013. He continues to work because he does not know what else he would do. There are days when he is not able to do the work. He has no computer skills and does not use one. He does not use email. He does not type. His earnings have been adversely affected. His wages are less because he does not work as much as he used to. He had a prior workers' compensation claim.

As for how he contracted MRSA, he stated his son had perhaps a staph infection or ring worm, but never MRSA. He never visited a hospital or nursing home or doctor's office before this injury. He did not have a regular doctor because he never went to one. Everyone in his home was healthy in 2012.

On cross examination, claimant agreed his company has existed since 1979, at first under a different name. Exhibit 4 shows hours he worked from October 2012 through June 4, 2014. More recent records were requested from the accountant but have not yet been provided. Claimant still works for the company, but not as many hours.

He agreed the medical records say his son had MRSA but claimant denies this. He asked his son and his son's wrestling coach, they agreed he never had MRSA.

Dr. Boarini has not recommended any surgery for claimant's back or shoulder. Claimant also saw David Hatfield, M.D., in February 2014 at Des Moines Orthopedic Surgeons. He also did not recommend any back surgery. He felt claimant was just getting old and his back problems were due to wear and tear. Claimant told him he had never had any back problems before. Neither Dr. Boarini nor Dr. Hatfield placed any

permanent work restrictions on him. The first restrictions came from Dr. Kuhnlein in January 2015.

He agreed the severe back pain came on during the night, not at the job site. He agreed there is no objective evidence MRSA was present at the job site, or any job site he worked at that week. He was told he could even get it from the soil. He worked at several job sites that summer. He is not aware of evidence that MRSA was at any of those sites. He did not have any testing done at any of the sites. He did not work at a military site, a jail, a nursing home, or a wrestling room.

The work he does today includes sheet rocking, roofing, and the same type of construction work he did prior to October 2012, but he does not do as much. He does on occasion work 80 hours in a two-week period but it wears him out. He usually works less.

He made a workers' compensation claim for his shoulder injury. He does not know if the insurer has paid for those medical expenses. He does plan to have surgery for that.

Claimant was paying himself a salary at the time of the injury, but pays himself an hourly rate around $35.00 per hour. It was probably equivalent to $32.00 or $35.00 per hour at the time of injury, or a little less than today.

At Exhibit 1, page 38, Dr. Kumar mentions claimant's son having had MRSA. Claimant does not recall telling the doctor his son had MRSA. However, claimant states his son never had MRSA, there is no diagnosis of MRSA for his son at any time. He was not in a locker room in 2012, nor was he in a wrestling room, jail, or hospital.

He still does sheet rock and other duties but he does it slower. No doctor has told him he should find another line of work. He is not aware of anyone from the insurer collecting samples at work sites. Exhibit 3 shows the unpaid medical bills for his back only. He has not been reimbursed any mileage expenses.

Dr. Kuhnlein provided an independent medical examination (IME). Further facts will be addressed below.

CONCLUSIONS OF LAW

The first issue in this case is whether the claimant sustained an injury arising out of and in the course of employment on October 13, 2012. Closely related are the issues of whether any temporary or permanent disability are causally related to a work injury.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and

circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

Claimant's petition is based on the assertion he suffered cuts and scrapes while doing construction work, which resulted in him contracting a MRSA infection.

Dr. Comstock confirmed MRSA infections often begin with a "portal of entry" through a skin cut or abrasion. He noted, "Mr. Streit is subjected to microabrasions on a regular basis in the course of his work as a carpenter. It is very unlikely any other mechanism would be the cause of his illness." MRSA is not contracted through inhalation or ingestion. (Exhibit 7, page 2)

Dr. Karim also relates claimant's back condition to his MRSA infection, which began about October 13, 2012. (Ex. 1, p. 72)

The emergency room personnel noted claimant had numerous cuts and scrapes. (Ex. 1, p. 21) Later medical records noted a history of cuts and scrapes from work, as well as sores on his scalp and in his beard from sweating at work. (Ex. 1, p. 38)

Defendants assert other possible sources of claimant's MRSA exposure, such as hospitals, nursing homes, jails, locker rooms, child care centers, etc. However, there is no evidence in the record claimant was exposed to any of these. In spite of references to claimant's son having MRSA as a wrestler in the medical histories, claimant credibly testified this is incorrect. His son has never been diagnosed with MRSA. His son was playing football at the time of claimant's injury, not wrestling. His son had ringworm but not MRSA.

Defendants also rely on the opinions of their doctors. Dr. Kumar said "I am unable to determine if his current condition is work related." (Ex. A) This is something less than an opinion it is not work related.

Kevin J. Cunningham, M.D., felt there was inadequate evidence to conclude the MRSA was caused by claimant's work, because claimant's work was not considered a high risk occupation for MRSA exposure. (Ex. B)

Dr. Boarini does not offer an opinion on whether the MRSA was caused by work conditions, deferring to an infectious disease specialist. (Ex. C, p. 1) Dr. Hatfield also does not express an opinion on whether the MRSA is the result of workplace conditions.

Claimant underwent an IME with Dr. Kuhnlein. Dr. Kuhnlein noted there was no evidence of MRSA being present at any of claimant's work sites. There was no evidence of claimant coming into close contact with a co-worker who had MRSA. He also discussed whether claimant's son, who he assumed had been diagnosed with MRSA, worked with claimant at the website. He also considered whether claimant worked at home, where MRSA may have been present from his son.

Dr. Kuhnlein appears to adopt the approach that in order for him to say claimant's MRSA is work related, claimant must have been exposed to MRSA at a work site. (Ex. 2, pp. 17-18) Dr. Kuhnlein goes so far as to say:

> If it could be shown that Mr. Streit had work-related exposure to MRSA in one of the fashions as described above, then it becomes more likely that Mr. Streit's MRSA infection was work-related. Please note that all theories of work-relatedness depend upon actual exposure to MRSA that can be proven in a work related setting. If there is no objective proof of work-related MRSA exposure, then it is speculative to assume that this was work-related MRSA. Simply saying that one's arms have cuts and scrapes and therefore the MRSA is work-related is insufficient evidence to medically prove work place exposure. (emphasis added)

(Ex. 2, p. 17)

Dr. Kuhnlein's focus on whether the work site had MRSA suggests he has taken upon himself the task of answering the question whether claimant's MRSA is a work injury. Dr. Kuhnlein's only proper role is to offer an opinion on whether there is a causal connection between claimant's current condition and his MRSA and work conditions. Whether a work injury has occurred is a legal, not a medical, question and is the province of the undersigned.

Dr. Kuhnlein did state,

> At this time, there is no objective evidence that the MRSA entered his body through one of the cuts on his arms – I do not find any evidence that the arms were cultured to show that they were MRSA infected. That is a reasonable presumption however.

(Ex. 2, p. 17)

Dr. Kuhnlein concluded:

> Another scenario is that the MRSA infection "lit-up" the underlying degenerative disc disease, in combination with scar tissue formed by the epidural abscess and the bilateral iliopsoas abscesses. If it can be proven as above that the MRSA infection was work-related, then it becomes more likely that the degenerative disc disease was "lit-up" and materially aggravated by the MRSA infection. If the MRSA infection is deemed to be work-related (which must medically depend on proof of work related exposure in such a way he was infected), then it becomes far more likely that his current low back pain is work-related through the deleterious effects of the MRSA infection. If it cannot be shown that the MRSA infection was work-related, then he cannot be shown that his back condition is work-related related to the known MRSA infection.
>
> In brief summary, Mr. Streit did have cuts, abrasions and breaks in his skin. To close the causation loop and make his MRSA infection work-related, it must also be shown that he was infected by MRSA in a work-related scenario where it is likely the MRSA entered his cuts, scrapes or open sores. All must be present in this case. You cannot simply assume that because he had cuts and because he was working in a dirty environment, then he had MRSA. MRSA is community-acquired in very specific circumstances, and it can typically be proven to exist in those circumstances, such as in contact sports, in military camps, childcare centers and jails. If it can be proven he had such MRSA exposure in a work related fashion then the MRSA exposure would be related to his work, and all the conditions, including the back condition, would be work related. (emphasis in original)

(Ex. 2, p. 18)

Dr. Kuhnlein was asked whether claimant's MRSA was work related, and he embarked on a detailed discussion of what are actually legal questions, not medical questions. The proper question to be answered by Dr. Kuhnlein would be, "Was claimant's MRSA caused by work place conditions". Dr. Kuhnlein assumes in order to say yes, claimant must show MRSA was present at a work site. The more appropriate question is, did claimant's work injuries--the cuts and scrapes—cause his MRSA by allowing the infection into his body, regardless of where he was exposed to MRSA? Dr. Kuhnlein states it is a "reasonable presumption" claimant's arms were MRSA infected. His logic breaks down, however, when he insists it be shown the MRSA itself was present at a work site before he can say it is work related.

With all due respect, it is also sufficient if claimant has shown that work conditions caused his cuts and scrapes on his arms, which is clearly the case. Dr. Kuhnlein agrees it is "reasonable" to presume claimant's arms were infected with MRSA. Dr. Comstock definitively states claimant's arm cuts and scrapes allowed the MRSA infection to enter his body, as MRSA is not contracted by inhalation or other methodologies. Dr. Kuhnlein and other doctors, as well as the parties in this case, make the error of assuming the MRSA itself must have been present at the work site in order for claimant to have suffered a work injury. Wherever claimant was exposed to MRSA, it has been established it entered his body through the work related cuts and scrapes. That is what makes his MRSA infection a work-related injury.

The medical evidence must be coupled with the non-medical evidence. That evidence indicates claimant was not exposed to any of the other common modalities of MRSA exposure. It also shows claimant suffered chronic and numerous cuts, scrapes and abrasions, which he ill-advisedly picked at. Of course the fact he did pick at them and make them open up more cannot be considered a defense, as contributory negligence is not a proper consideration in a workers' compensation case. The fact remains the cuts and scrapes that allowed MRSA to later enter his body were caused by work activity. Whether the entry of the MRSA through the work-caused cuts and scrapes is considered part of the original injury or considered a sequel, it is clearly a work injury.

In weighing the evidence offered by defendants, they have produced medical records which suggest claimant's son was the source of MRSA. Claimant disputes those records. Claimant is found to be credible. It is found claimant has shown by a preponderance of the evidence his son was not the source of his MRSA exposure. The source of his exposure is not shown in the record. It is shown that he was exposed and contracted MRSA, resulting in impairment to his body. But as pointed out above, the source of the MRSA is not as important as the fact it was work activity that opened the cuts and scrapes on claimant's arms that allowed the MRSA to infect him, whatever its source.

It is concluded claimant has carried his burden of proof to show by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment. It is also concluded claimant has carried his burden of proof

to show his current back condition was also caused by his MRSA exposure, and that his temporary and permanent disability is causally related to his work injury, as is any medical treatment he received for those conditions.

The next issue is whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

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).

The parties stipulate claimant was off work from October 13, 2012 through April 1, 2013. Claimant was hospitalized on October 14, 2013, but when he was released, he was not able to return to work over the winter while continuing to receive medical treatment. Claimant was not a seasonal worker but worked all year long. Claimant was returned to work on a part-time basis on April 1, 2013.

Defendants' argument that claimant, as the owner of the company, continued to "reap the benefits of ownership of the company" while he was off work. This is irrelevant, as claimant was also an employee and clearly suffered a loss of earnings when his work injury prevented him from working and being paid wages. The fact he had another source of income is not germane.

As claimant has proven a work injury and resulting temporary disability, defendants will be ordered to pay healing period benefits from October 13, 2012 through April 1, 2013.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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.

Claimant is 54 years old. He has operated his own construction business for many years and is self-employed. He has been a working employer, doing manual labor alongside his employees. He has no office or computer skills.

As a result of his injury, claimant has a back condition consisting of bulging and herniated discs at L2-3, L3-4, L4-5 and L5-S1. (Ex. 1, pp. 70-71) He has work restrictions of not lifting over 40 pounds, with only occasional bending, squatting, kneeling and crawling. He takes medication for pain which limits his ability to work on ladders or at heights. He is also limited in his ability to work above shoulder height.

Dr. Kuhnlein assigned a rating of permanent partial impairment of seven percent of the body as a whole. (Ex. 2, p. 19) He also assigned permanent work restrictions of not lifting over 40 pounds occasionally, and not bending, kneeling, squatting, or crawling more than occasionally. (Ex. 2, p. 20) He can only work occasionally above shoulder level, and cannot work on ladders if he is on narcotic pain medication. He also cannot work with vibratory tools more than occasionally at or above shoulder height. (Id.)

Before his injury, claimant worked many long hours, an average of 66 hours per week. In 2013, the year he was injured, he worked an average of 25 hours per week. In 2014, he worked about 22 hours per week. (Ex. 4) This in itself is greater than a 50 percent loss in terms of hours he can work. He is no longer able to take on larger construction projects. He had no problems with MRSA or his back before this injury. He now has permanent restrictions and permanent impairment that will affect his ability to do the kind of work he did before for the rest of his life. He may be able to still operate his company but he can no longer work alongside his employees to the extent he has always done in the past. He has suffered a significant loss of earnings as a result of his work injury.

Based on these and all other appropriate factors of industrial disability, it is found claimant, as a result of his work injury, has an industrial disability of 60 percent.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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 1975).

Claimant seeks reimbursement of medical expenses necessitated by his work injury. (Ex. 3) He is also seeking medical mileage expenses. (Ex. 6)

The employer denied liability for this injury. Therefore the employer cannot object to these expenses as being unauthorized. The medical records also show all of the submitted expenses were necessitated by the work injury.

It is concluded defendants are responsible for all of the claimant's medical expenses submitted. They are also responsible for claimant's submitted medical mileage.

The next issue is whether claimant is entitled to reimbursement for an independent medical examination.

Defendants submitted reports by Dr. Boarini, Dr. Cunningham, and Dr. Kumar expressing opinions on causation. Although those opinions do not explicitly offer ratings of permanent impairment, they in effect offer ratings of zero impairment caused by this injury. Claimant was therefore entitled to an independent medical opinion under Iowa Code section 85.39 to rebut those opinions. He obtained one from Dr. Kuhnlein. (Ex. 5) Under Iowa Code section 85.39, claimant is entitled to be reimbursed for the costs of the IME.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant healing period benefits from October 13, 2012 to April 1, 2013, at the rate of eight hundred thirty eight and 39/100 dollars ($838.39) per week.

Defendants shall pay unto the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of eight hundred thirty-eight and 39/100 dollars ($838.39) per week from April 2, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 7th day of May, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JEH/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.