

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZACHARY TEW,

Claimant,

vs.

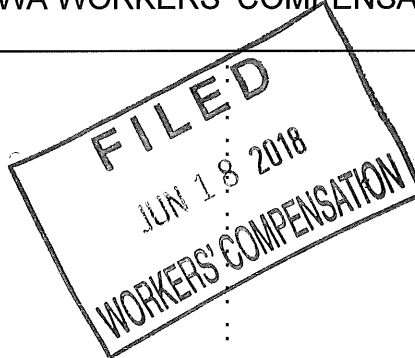
SPARBOE FARMS, INC.,

Employer,

and

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5065716

ARBITRATION

DECISION

Head Note No.: 1402.30

Claimant Zachary Tew filed a petition in arbitration on March 1, 2017, alleging he sustained injuries to his back and body as a whole while working for the defendant, Sparboe Farms, Inc. ("Sparboe") on May 25, 2016. Sparboe and its insurer, the defendant, Nationwide Agribusiness Insurance Company ("Nationwide") filed an answer on March 10, 2017, denying Tew sustained a work injury.

An arbitration hearing was held at the Division of Workers' Compensation, in Des Moines, Iowa, on March 28, 2018. Attorney Gregory Taylor represented Tew. Tew appeared and testified by telephone. Tew's mother, India Wirts, appeared and testified on Tew's behalf. Attorney Deborah Stein represented Sparboe and Nationwide. Nita Nurmi appeared and testified on behalf of Sparboe and Nationwide. Joint Exhibits ("JE") 1 through 4, Exhibits 1 through 20, and Exhibits A through H were admitted into the record. The record was held open through April 27, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Sparboe and Nationwide waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Sparboe and Tew at the time of the alleged injury.

2. Although entitlement to temporary benefits cannot be stipulated to, Tew was off work from May 27, 2016 through April 12, 2017.

3. At the time of the alleged injury, Tew's gross earnings were \$408.96 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is \$263.86.

4. Credits are not in dispute.

5. Costs have been paid.

ISSUES

1. Did Tew sustain an injury which arose out of and in the course of his employment with Sparboe on May 25, 2016?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is a cause of permanent disability, what is the extent of disability?

5. Has Tew established he is permanently and totally disabled under the statute?

6. If the alleged injury is a cause of permanent disability, what is the commencement date for permanent partial disability benefits?

7. Is Tew entitled to payment of medical expenses?

8. Is Tew entitled to alternate medical care?

9. Should penalty benefits be awarded to Tew?

10. Should costs be assessed against either party?

FINDINGS OF FACT

At the time of his evidentiary deposition on June 9, 2017, and at the time of the hearing on March 28, 2018, Tew was living in the O'Brien County Jail in Primghar, Iowa. (Exhibits 7, page 3¹; C, p. 6; Transcript, p. 15) Tew has been in custody since

¹ Claimant did not number the individual pages of the evidentiary deposition, Exhibit 7, and referred to the entire document as page 89. For purposes of clarity, the individual page numbers of the deposition will be referred to in this opinion. A video of the deposition was also produced as Exhibit 8.

November 7, 2016, and is waiting to be sentenced following a guilty plea to a drug felony relating to the sale of methamphetamine. (Ex. 7, p. 74; Tr., pp. 62-63) Tew is facing a minimum sentence of ten years in federal prison. (Tr., p. 63)

Tew is the father of three children. (Exs. A, p. 2; H) Tew dropped out of high school in the tenth grade. (Exs. A, pp. 4-5; H; Tr., pp. 14-15) Tew completed his GED while he was incarcerated in Illinois in 2016. (Tr., p. 14; Exs. 7, p. 5; H) Tew is a smoker. (Ex. H) At the time of the hearing Tew was twenty-five. (Tr., p. 14)

Tew has experience working as a sanitation worker, a forklift operator and water gun cleaner, furniture delivery and assembly worker, material handler for an electrician, laborer, meat processing worker, and register clerk in Iowa, North Carolina, and Oregon. (Exs. 6, pp. 75-76; 7, pp. 5, 52-60; A, pp. 6, 9-10, H; Tr., p. 16) Tew has never performed any office or sedentary work. (Tr., p. 16)

When he was fifteen, Tew was involved in a car accident and injured his lumbar spine. (Tr., p. 17; Exs. A, p. 20; H; 7, p. 6) Tew experienced sharp leg pain that went down his leg and lower back pain. (Tr., p. 18; Ex. 7, p. 7) Tew underwent a discectomy at L4-L5 with David Hatfield, M.D., an orthopedic surgeon. (Tr., pp. 17-18; Exs. A, p. 20; 7, p. 6) Tew testified the surgery eliminated his back and leg pain, and a week after the surgery he was up and walking without any problems, and two weeks later he was playing basketball. (Tr., pp. 17, 20) Tew reported he was 100 percent better and he was able to play tag football and cage box. (Tr., pp. 20-21; Ex. H)

Tew testified he has experienced "sciatica or sciatic pain, a little stiffness, and then some sharp – sharp shooting pains down [his] right leg" since the injury every few months, but "[n]othing that could keep [him] from functioning, though." (Tr., p. 21; Ex. 7, pp. 7-8) Tew relayed when he experienced sciatica he took ibuprofen, went to the doctor and requested anti-inflammatory and pain medication and he would be "back to normal" in two or three days. (Tr., p. 22; Exs. H; 7, p. 9)

Tew has treated with Aaron Peimann, M.D., with UnityPoint Health. (JE 1, p. 4; Ex. 7, p. 9) In February and May 2012, Tew attended appointments with Dr. Peimann, complaining of back issues, spasms, and pain. (JE 1, pp. 4-6) Tew relayed his pain was especially sharp when getting up and reported he was experiencing aching across his lumbar spine. (JE 1, p. 6) Tew returned to Dr. Peimann in November 2014, complaining of extreme back pain, with chronic pain that had worsened, radiating down his right buttock and lateral thigh. (JE 1, p. 1)

Sparboe hired Tew on February 25, 2016, as a full-time stocker/taper, where he was responsible for stacking packaged eggs weighing between twenty and thirty pounds by order onto pallets. (Exs. A, p. 11; 6, p. 75; 7, pp. 9-10; 9, H; Tr., p. 23) The job description provides the worker must be able to lift fifty pounds frequently, work on his or her feet for eight or more hours per day, work five to six days per week, and engage in repetitive motion, including lifting and carrying egg cases no further than ten feet, lifting above head and shoulder height, bending, and stacking. (Ex. 9, p. 80) Tew

relayed the boxes came down a conveyor belt and he would bend and twist to move each box from the conveyor belt to the pallet. (Ex. 7, pp. 11-12) Tew stacked boxes near the ground up to six or seven stacks high. (Ex. 7, p. 13)

On May 10, 2016, Tew attended an appointment with Dr. Peimann reporting new back pain in the last twenty-eight days that is radiating down his right leg. (JE 1, p. 10) Dr. Peimann assessed Tew with bilateral low back pain with sciatica, presence unspecified. (JE 1, p. 11)

Tew testified on Wednesday, May 25, 2016, he had been stacking egg cases for five or six hours, and

it was getting a lot worse. Towards the end of the shift I had my 90-day review with Derek Holmes, my supervisor, manager at the time, and it probably took me 15 minutes to walk 50, 60 feet.

Yeah, it kept getting worse, and walking to my review that night, it was hard for me to get to where I was going to sit down. I mean, that's where I really started noticing it was very bad.

(Tr., pp. 35-36) Tew relayed on Thursday, he went to work and he was experiencing sharp, more intense pain. (Tr., p. 37) Tew later testified his review occurred on Thursday night, around 6:00 p.m. or 7:00 p.m. (Tr., p. 40)

During his recorded statement, Tew relayed he thought he could make it the next day, his team lead asked if he was okay, and he replied he thought he had slept wrong. (Ex. H) Tew stated during his review that afternoon he could barely sit down. Holmes asked him if he was okay and he replied he was and went home. (Ex. H) Tew acknowledged when he told Holmes his back was hurting and he told Holmes he must have slept wrong, and he did not tell Holmes he injured himself at work. (Tr., p. 82)

Tew testified at hearing on May 27, 2016, he woke up at 5:30 and he could not make it out of bed to go to the bathroom. (Tr., p. 39) Tew's mother, Wirtz came over to his apartment and helped him into the bathroom to shower. (Tr., p. 41) Tew stated he spoke with Morgan Shafer at Sparboe, and told her, "[m]y back – I injured my back. My back's hurting. I'll bring a doctor's note," and Shafer replied, "[o]kay. Make sure you bring that note." (Tr., p. 39) According to Sparboe's payroll records, Tew did not work after May 26, 2016. (Tr., p. 116)

Tew attended an appointment with Tiffany Gramblin, NP, with UnityPoint Health, on May 27, 2016. (JE 1, p. 13) Gramblin documented:

Zachary presents to the clinic with symptoms as described below. No recent injury or trauma to this area. He has had low back problems since he was a teenager and had a lumbar discectomy in 2008. He has not seen an orthopedic specialist since that time. Intermittent flares 3-4 times per year, this is the typical way his flares present. Pain shoots from lower

thoracic down right leg. Rated pain at 9/10 "shooting, throbbing". No numbness, tingling, loss of bowel or bladder control.

(JE 1, p. 13) Gramblin noted the problem was "recurrent" and the onset occurred two days ago and was rapidly worsening. (JE 1, p. 13) During her examination, Gramblin noted Tew "exhibits decreased range of motion, tenderness, bony tenderness, swelling, pain and spasm." (JE 1, p. 14) Gramblin administered a Toradol injection, and prescribed cyclobenzaprine and hydrocodone. (JE 1, pp. 14-15)

On June 2, 2016, Tew attended an appointment with Dr. Peimann, complaining of back pain that started on Friday without a known injury. (JE 1, p. 16) Dr. Peimann documented Tew reported having aching on May 26, 2016, and woke up the next day with severe lumbar pain and he was unable to walk. (JE 1, p. 16) Dr. Peimann noted, "NO injury recalled 5/26." (JE 1, p. 16) Dr. Peimann diagnosed Tew with bilateral low back pain with right-sided sciatica, a bulging lumbar disc, and right sciatica. (JE 1, p. 17) Dr. Peimann excused Tew from work from May 27, 2016 through June 12, 2016. (JE 1, p. 21)

Tew testified at hearing while he was excused from work he drove past Holmes on his way to Hy-Vee. (Tr., p. 46) Tew reported Holmes was mowing his grass, and he stopped to talk to him. (Tr., pp. 46-47) Tew testified when he stopped to talk to Holmes he told Holmes about his back pain, he asked if there was any light duty work available, and Holmes replied there was not and that he should focus on his back and getting better. (Tr., p. 48) Tew relayed,

[a]nd he told me there was nothing I could do that's light duty. I asked him why. He said it was less – he said, "We're going to have to release you." It was less paperwork for corporate if they release me and keep me as a rehire.

And I can remember being very confused and upset about that because I just went and got a check, I think, 6/10, that Friday, and here it was Saturday or Sunday and he's telling me, "Hey, look, we have to get rid of you because it's less paperwork for corporate, and we'll bring you back as a rehire. Just focus on your back, get your back fixed and come back and see us." He said, "You'll start off the same pay as you left and you'll have to redo your 90 day probation period."

(Tr., pp. 48-49)

Sparboe terminated Tew's employment on June 21, 2016. (Tr., p. 118) Tew acknowledged he knew he had been fired as of June 28, 2016. (Tr., p. 84)

Nurmi has worked for Sparboe for forty years, and has been the senior human resources manager for the past ten years. (Tr., pp. 108-09) Nurmi reported Tew was

fired because he failed to provide an additional work release or documentation to Sparboe. (Tr., p. 136)

Nurmi testified Sparboe offers light duty work to its employees. (Tr., p. 128) Nurmi reported in her ten years with the company, there was only one case where the person had a breathing issue and could not be accommodated. (Tr., p. 129)

Tew worked for Sparboe for ninety days. (Ex. 7, p. 63) Tew testified he has not worked for any employer for a longer period than the period he worked for Sparboe. (Ex. A, p. 11)

Tew underwent magnetic resonance imaging on June 22, 2016. (JE 1, pp. 22-23) The reviewing radiologist listed an impression of:

1. L3-L4: Small posterior central annular fissure. No focal protrusion.
2. L4-L5: Previous right-sided laminectomy. Large right paracentral disc extrusion effacing the ventral and right side of the thecal sac and displacing multiple traversing nerve roots. There is impact upon the traversing/exiting right L5 nerve root.
3. L5-S1: Large posterior central disc extrusion abutting the ventral thecal sac. No lateralization or nerve root compression.

(JE 1, pp. 22, 25)

During a follow-up appointment on June 27, 2016, Dr. Peimann noted Tew was continuing to have lower lumbar back pain, radiating down his right leg, and difficulty lying flat on his back without pain, but noting his gait had improved significantly and was "almost back to normal." (JE 1, p. 28) Dr. Peimann documented Tew reported he lost his job the day after his note expired. (JE 1, p. 29)

On August 15, 2016, Tew attended an appointment with Dr. Hatfield, an orthopedic surgeon. (JE 2, p. 35) Tew relayed that he had been experiencing back, bilateral buttock and leg pain, greater on the right than left "since May 24, 2016 following moving, lifting and twisting cartons of eggs at work." (JE 2, p. 35) Tew reported he had constant pain that was worse in the morning and at night, and worse with lifting, sitting, bending, and twisting. (JE 2, p. 35) Tew relayed he was experiencing numbness, and weakness in his legs and feet. (JE 2, p. 35) Dr. Hatfield reviewed Tew's imaging, which he found "shows large recurrent right L4-5 disc extrusion as well as a moderately large midline L5-S1 disc extrusion." (JE 2, p. 36)

Tew's attorney sent Dr. Peimann a letter asking him to check "agree" or "disagree" with contention statements. (Ex. 1, p. 1) Dr. Peimann responded on September 21, 2016, checking he agreed with all of the statements without providing any written comments. (Ex. 1, pp. 1-2) Dr. Peimann agreed Tew presented to him on June 2, 2016 with low back pain that was much more severe than his back pain during

previous visits, noting he was complaining of having difficulty walking, bending, and standing up straight, and he suspected Tew had herniated a disc due to the acute nature of the symptoms. (Ex. 1, p. 2) Dr. Peimann agreed he took Tew off work from May 27, 2016 through June 12, 2016, he did not release him to return to work, he believed Tew's work activities at Sparboe stacking boxes on pallets on May 25, 2016 were a substantial contributing factor in the development of his low back symptoms and need for surgery recommended by Dr. Hatfield, and deferred to Dr. Hatfield for restrictions. (Ex. 1, p. 2)

Tew's attorney sent a letter to Dr. Hatfield, requesting his opinion. (Ex. 2, p. 3) Dr. Hatfield responded on October 3, 2016,

[r]eferencing your letter of September 28, 2016, based on information presented to me at the time of Mr. Tew's evaluation, I would relate his symptoms and recurrent L4-5 disc extrusion to the May 2016 work incident as described.

As above, given current findings I would relate his potential surgery to the work incident as described.

I did not assign temporary restrictions at the time of his office evaluation as he was not working at that time. No restrictions were requested initially. Had Mr. Tew requested restrictions I would typically have assigned a restriction of 10-15 pounds of lifting with limited bending and twisting at most. Again, had restrictions been intended a further discussion would be held and it is possible he would not be able to meet even this criteria.

All considered it is unlikely he would be able to continue without some form of restriction in the state in which I evaluated him.

(Ex. 2, p. 3)

The Sparboe Humboldt facility closed on October 28, 2016. (Tr., p. 129)

On December 14, 2016, Tew was examined by Anthony Peters, PA-C with Primghar Mercy Medical Clinic in jail. (JE 3, p. 39) Peters noted Tew had been seen a couple of years ago and he has chronic back pain. (JE 3, p. 39) Peters recommended Tew receive a double mattress in the jail, and prescribed gabapentin, Meloxicam, and Tramadol. (JE 3, p. 39) During an appointment on December 23, 2016, Tew complained of pain and numbness going down his leg. (JE 3, p. 39) Peters continued Tew's gabapentin and Tramadol and prescribed tizanidine. (JE 3, p. 39)

Tew attended an appointment with Peters at the jail on December 28, 2016. (JE 3, p. 40) Tew relayed the medication was helping with his pain, but he continued to have loss of feeling in his legs and fell to the floor. (JE 3, p. 40) Peters documented

Tew was walking without problems and his strength in his lower extremities was normal and symmetric. (JE 3, p. 40)

On January 2, 2017, Tew requested a medical visit for anxiety. (JE 3, p. 41) Peters examined Tew on January 11, 2017, assessed him with depression, insomnia, and numerous herniated disks, L4 to S1, and prescribed Wellbutrin. (JE 3, p. 42) Tew continued to complain of back pain and he received treatment while in jail. (JE 3)

Tew attended an appointment with Daniel McGuire, M.D., an orthopedic surgeon, on April 6, 2017. (JE 4, p. 49) Dr. McGuire reviewed Tew's imaging and examined him. (JE 4, p. 49) Dr. McGuire documented, "I explained to him that if he had severe excruciating leg pain and was not able to work, we would probably offer him a laminectomy. His primary complaint is back pain, not leg pain. Work is not an issue for the next 7 or 8 years." (JE 4, p. 49) Dr. McGuire provided Tew with a brochure on stretching exercises, and offered to see him in three to six months. (JE 4, p. 49)

Pursuant to a request from counsel, Dr. McGuire issued an opinion letter on April 12, 2017, as follows:

I evaluated Zachary Tew last week and I have enclosed my medical records. Some of your questions may be answered in my office note.

Zachary's current problems include his primary complaint of back pain, although he does have some leg pain. He has 2-level disk degeneration with a large right-sided disk herniation at L4-L5 and then a central disk herniation at L5-S1. His spine condition is pertinent for a laminectomy approximately 8 years ago at L4-L5.

Mr. Tew relates to me a work incident at Sparboe Farms in late May 2016. I believe the work incident was a substantial contributing factor in Mr. Tew's back and leg symptoms and the subsequent need for medical treatment.

My current recommendation for treatment is nonsurgical care. With his reduced activity, he has probably had some improvement in his leg symptoms. With his relatively sedentary lifestyle, I assume that would make his back symptoms a little more tolerable. I did encourage him to be on a little bit of a stretching program.

Based on my observation of him from last week and then the realization that he is in a situation where his activities would be severely limited for 5 or 6 years, I would be a very big proponent of nonsurgical care. In that scenario, I would assign a 5% impairment rating to the body as a whole as it pertains to the work incident in May 2016. This would be according to the American Medical Association guidelines. Currently, his restrictions would be significant. I might limit him to sedentary light work,

meaning that he could alternate stand, sit, and walk, lift things that maybe weigh 5 to 8 to 10 pounds frequently, but not continuously.

If he were seeking a job at this time, he would require quite a few restrictions. If he attempted to do a heavier job (if allowed), I would imagine that he would become quite symptomatic including with leg pain, and at that point I would probably be an advocate for a laminectomy at L4-L5 to help with his right leg pain. I would not address the disk at L5-S1. If he came to surgical intervention, his impairment would be in the 10% to 12% range, depending on his outcome. However, we then probably could push him with a rehabilitation program and probably get his restrictions into the 20-to 30-pound range and maybe get him back to a little more heavy job such as a medium classification.

(Ex. 3, p. 8)

On June 8, 2017, Tew attended an appointment with Peters, reporting he had tripped on his sandals at the jail and was experiencing a lot of back pain. (JE 3, p. 45) Peters administered a Toradol injection, and prescribed tizanidine. (JE 3, p. 45) During a follow-up appointment on June 28, 2017, Tew relayed he was experiencing headaches, double vision, and urinary incontinence because of numbness. (JE 3, p. 46)

Tew received lumbar spine magnetic resonance imaging on July 28, 2017. (JE 3, p. 47) Tew's medical provider documented the imaging was not materially different from the June 27, 2016 imaging, and that there was "[n]o reason seen for urinary symptoms. Continue conservative treatment." (JE 3, p. 47)

Sparboe and Nationwide denied Tew's claim, alleging he had reported he injured himself when he fell in a hole while mowing grass. (Tr., p. 45) Tew denied mowing any lawns in May 2016, and reported he was living in an apartment complex where he was not responsible for lawn maintenance. (Tr., p. 45; Ex. 7, pp. 24-25) At hearing when questioned, Tew testified "I probably haven't touched a lawn mower, to be honest, since — it was before 2014, before the first time I got in trouble. I haven't touched a lawn mower for a long time." (Tr., p. 46)

Eric Van Boening executed an affidavit for Tew, noting he has been the landlord for Riverview Apartments since May 26, 2016, where Tew lived. (Ex. 11, p. 84) Van Boening reported he has been responsible for the lawn care since May 26, 2016, and to the best of his knowledge "none of my tenants have ever mowed the lawn." (Ex. 11, p. 85) The previous landlord, Juanita Johnson, also completed an affidavit relaying she was the landlord for the property from 1998 until May 25, 2016, and that while she was the landlord she was responsible for the lawn maintenance and she "never asked any of [her] tenants to mow the lawn, and none of [her] tenants have ever mowed the lawn." (Ex. 12, p. 91)

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination of Tew on February 1, 2018. (Ex. 4) Dr. Bansal reviewed Tew's medical records, interrogatories, job description, and deposition. (Ex. 4, p. 12) Dr. Bansal did not examine Tew. (Tr., p. 82) Dr. Bansal diagnosed Tew with a large recurrent right L4-L5 disc extrusion, and moderately large midline L5-S1 disc extrusion. (Ex. 4, p. 20) With respect to causation, Dr. Bansal opined:

Mr. Tew was engaged in tasks that included frequent bending and lifting while stacking boxes on pallets. It is my medical opinion that his work at Sparboe Farms was a substantial aggravating factor for his L4-L5 disc extrusion. While he did have pre-existing lumbar spine pathology, it would be medically implausible that he would have been able to start working at Sparboe Farms with a large disc extrusion at L4-L5. It is more plausible that it came on insidiously during his tenure at Sparboe Farms, increasing to the point that he needed surgical consultation.

(Ex. 4, p. 20)

Using Table 15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal opined Tew meets the criteria for a DRE Category III impairment, noting "[h]e has a documented imaging study indicating a clinically relevant large right L4-L5 disc extrusion with corresponding radiculopathy," and assigned a ten percent permanent impairment rating. (Ex. 4, p. 22) Dr. Bansal agreed with Dr. McGuire that Tew reached maximum medical improvement on April 12, 2017 and agreed with his recommended restrictions. (Ex. 4, p. 22) Dr. Bansal recommended further treatment consisting of medications, injections, or other treatment recommended by a pain specialist, and if his radiculopathy worsens, a surgical decompression at L4-L5. (Ex. 4, p. 22) Dr. Bansal agreed with Dr. McGuire's recommended restrictions. (Ex. 4, p. 22)

Tew testified that since May 2016,

I've kept in constant pain, constant backache, constant leg ache, and it's become worse. It's led me to be very inactive and I have a very inactive lifestyle which I wish wasn't the case. I'm 300 pounds.

It hurts for me to sit for a long period of time. I can't walk up and down stairs. There's a lot of things that I can't do anymore, you know, and it's – honestly, it's really depressing because I've always been a very physical person, always, brute and brawn. I'm trying to get the brawn. Yeah, there's a lot of things that has changed since May of 2016.

(Tr., p. 50) Tew relayed he has pain in his whole lower back region, and he has numbness and wets himself. (Tr., pp. 50-51)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

Whether a claimant's injury arises out of the claimant's employment is a "mixed question of law and fact." Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007). The Iowa Supreme Court has held,

[t]he factual aspect of this decision requires the [trier of fact] to determine "the operative events that [gave]rise to the injury." Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). Once the facts are determined, a legal question remains: "[W]hether the facts, as determined, support a conclusion that the injury 'arose out of . . . [the] employment,' under our workers' compensation statute."

Id.

This is a denied claim. Sparboe and Nationwide deny Tew sustained an injury arising out of and in the course of his employment, challenging his credibility based on

discrepancies between his deposition testimony, evidentiary deposition, hearing testimony, and medical records, and his criminal history. Tew rejects the assertion and contends he has met his burden of proof.

A. Felony Convictions

During the hearing and in their post-hearing brief Sparboe and Nationwide challenge Tew's credibility based in part on his history of felonious convictions. Iowa Rule of Evidence 5.609(a) provides:

(1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines the probative value of admitting this evidence outweighs its prejudicial effect to the accused, and

(2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

The limitations period is ten years from conviction or release from confinement. Iowa R. Evid. 5.609(b). The crimes at issue in this case, felony drug convictions, were punishable by imprisonment in excess of one year, and occurred within the past ten years. (Ex. A) In weighing the probative value of the evidence with the danger of unfair prejudice to Tew, his past criminal convictions resulting in incarceration are admissible as impeachment. Tew's crimes are not crimes of dishonesty, and I do not find them particularly probative.

B. Credibility Generally

Sparboe and Nationwide challenge Tew's testimony that he was injured at work. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Tew gave a recorded statement, testified in a deposition, during an evidentiary deposition that was videotaped, and at hearing. I did not find him to be a credible witness.

Tew worked for Sparboe for ninety days. He has not identified a specific, traumatic event that occurred at work, causing an aggravation of his preexisting lumbar spine problems.

Tew provided a recorded statement stating at the time of his review on May 26, 2016, he could barely sit down, Holmes asked him if he was okay, he replied he was,

and he went home. (Ex. H) Tew acknowledged when he told Holmes his back was hurting he stated he must have slept wrong, and he did not tell Holmes he injured himself at work. (Tr., p. 82)

Tew sought medical care the next day, on May 27, 2016. (JE 1, p. 13) During his appointment Tew told Gramblin he had had low back problems since he was a teenager with "intermittent flares 3-4 times per year" and that he had "[n]o recent injury or trauma to this area." (JE 1, p. 13) Tew's medical records do not connect his back pain with any work event or injury.

Tew returned for additional medical care with his family physician, Dr. Peimann on June 2, 2016. (JE 1, p. 16) Dr. Piemann documented, "NO injury recalled 5/26," and he excused Tew from working from May 27, 2016 through June 12, 2016. (JE 1, p. 16) Dr. Piemann's records do not support Tew relayed he had sustained a work injury.

Tew received magnetic resonance imaging on June 22, 2016, ten days after his work excuse expired. (JE 1, pp. 22-23) Tew testified during his deposition, evidentiary deposition, and at hearing he reported his work injury to Holmes while Holmes was mowing his yard, requested light duty work, and Holmes responded he had been terminated. (Ex. A, p. 24, Ex. 7, p. 31; Tr., pp. 47-48)

Holmes recalled Tew informing him he had back pain when he was mowing, and that Tew had hurt his back. (Ex. 116, p. 118e) Holmes denied telling Tew he had been terminated and he could be rehired after his back condition improved. (Ex. 116, p. 118e) At the time of his deposition Holmes was employed by Hog Slat. (Ex. 116, p. 118g) There was no evidence presented at hearing that Holmes had a motive to be dishonest.

During his evidentiary deposition Tew's attorney asked him whether he "expressly or explicitly" ever told anyone at Sparboe why his back was hurting. (Ex. 7, p. 37) Tew relayed he had told a co-worker, James Smith. (Ex. 7, p. 38) Tew's counsel then asked about whether he had ever told Holmes why his back was hurting:

Q. Did you ever talk to Derek about why your back was hurting?

A. Not really no.

(Ex. 7, p. 38)

Nurmi has worked for Sparboe for forty years, and has been the senior human resources manager for the past ten years. (Tr., pp. 108-09) Nurmi testified Sparboe offers light duty work to its employees. (Tr., p. 128) Nurmi reported in her ten years with the company, there was only one case where the person had a breathing issue and could not be accommodated. (Tr., p. 129) At hearing I had the opportunity to observe Nurmi testify in-person. Nurmi maintained appropriate eye contact, her rate of speech was appropriate, and she did not engage in any furtive movements. I found Nurmi's

testimony reasonable and consistent with the other evidence I believe. I do not believe Holmes told Tew Sparboe did not have any light duty work for him.

The timing of the events reported by Tew is also inconsistent. During his deposition on June 9, 2017, at 12:07 p.m., Tew testified,

[w]hen I seen Derek mowing his grass, I was driving a van. I pulled up along aside of him. He said, how you going? How's your back" I'm messed up a little bit. He said, so what are they going to do? I said, I got –this is before I went to Hatfield. This is after the MRI. And I told him I got to go see a specialist, and he said okay. . . .

(Ex. A, p. 24) During his evidentiary deposition an hour later the same date Tew testified he saw Holmes within the two-week time period he was excused, Holmes asked him "what was up. And I told him I got an MRI. I just had an x-ray. They said they think it's a herniated disk." (Ex. 7, p. 31) At the hearing on March 28, 2018, Tew testified the conversation happened with Holmes "before the checkup, it was before June 12th or 13th. I want to think it was the week of that 6/10 to 6/12, 6/13." (Tr., p. 47) This is well before the June 22, 2016 magnetic resonance imaging. No effort was made at hearing to clarify Tew's earlier testimony concerning the inconsistent timing of the purported conversation with Holmes.

Later, during his evidentiary deposition Tew's counsel asked him, and he responded:

Q. How – I mean, so when he – I mean, did he tell you right then that you were terminated, or how did that work?

A. He told me I was terminated, but it was a friendly terminated. We're going to hire you back after your back is okay. And you'll have to go through the 90-day process again, and that was it. I went and asked my stepdad. I told him about it. Hey, they've released me. And he tells me, they can't do that if you haven't seen any termination paperwork. And I told him no. I don't know if that was that day or the next or the day after. I went to Sparboe, and I asked Morgan Schaffer for termination paperwork. And she clarified she didn't want to get in trouble and she doesn't think she can give that to me. And had me fill out on a blank sheet of print paper, I, Zachary Logan Tew, request my termination paperwork. I gave my address to my apartment, and I signed it. And I don't really for sure – or if not, I put my cell phone number on there, but I think I did. And I gave it back to her. And she was supposed to fax it to somebody and get the termination paperwork mailed to me. I never seen it.

(Ex. 7, pp. 32-33) Tew requested his termination paperwork on June 28, 2016. (Ex. 10, p. 83) The request is in his handwriting. (Ex. 10, p. 83) The timing of his written request is not consistent with his testimony at hearing concerning the relevant timeline of events. Tew testified during his evidentiary deposition that he requested the termination paperwork, "I don't know if that was that day or the next or the day after. I went to Sparboe, and I asked Morgan Schaffer for termination paperwork." (Ex. 7, p. 32) The alleged conversation with Holmes occurred sometime between June 10 and June 12, 2016, the date he requested the termination paperwork was not that day, the next day, or the day after. I do not find his testimony credible.

When asked whether he told Holmes about why his back was hurting Tew responded, "[n]ot really no." (Ex. 7, p. 38) There is no credible evidence in the record Tew reported a work injury to Sparboe until his attorney sent a letter to Sparboe on July 24, 2016. (Tr., pp. 86-87; Ex. 14, pp. 98-99)

Based on the inconsistencies in Tew's testimony, and all of the evidence, including his medical records, I do not find Tew to be a credible witness. Tew had a preexisting lumbar spine condition. Tew has not met his burden of proof he sustained an injury arising out of and in the course of his employment with Sparboe. Given this finding, the remaining issues, other than costs are moot.

II. Costs

Tew seeks to recover the \$100.00 cost of the filing fee, the \$1,994.00 cost of Dr. Bansal's report, and the \$1,463.20 cost of vocational assessment from Rene Haigh. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Given Tew was unsuccessful on the merits of his claim I decline to assess costs to Sparboe and Nationwide.

ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing in this proceeding.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 18th day of June, 2018.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.