BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTHONY MIYOSE, Claimant, vs. ESSENTIA PROTEIN SOLUTIONS, LTD., Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 20011901.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1401, 1402.20, 1402.30, 1402.50, 1403.30, 2209, 2401, 2801, 2802, 2902

STATEMENT OF THE CASE

Claimant, Anthony Miyose, filed a petition in arbitration seeking worker's compensation benefits against Essentia Protein Solutions, LTD ("Essentia"), employer, and Employers Mutual Casualty Company, insurer, for an alleged work injury date of August 12, 2020. The case came before the undersigned for an arbitration hearing on July 1, 2021. This case was scheduled to be an in-person hearing occurring in Fort Dodge. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 10, and Defendants' Exhibits A through N.

Claimant testified on his own behalf. Megan Thorpe also testified on behalf of claimant. Jason Lamaak and Jack Wolf testified on behalf of the employer. Aaron New was also present on behalf of the employer but did not testify. The evidentiary record closed at the conclusion of the evidentiary hearing on July 1, 2021. The parties submitted post-hearing briefs on August 6, 2021, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on August 12, 2020;
2. If so, whether claimant provided timely notice of the injury to the employer under Iowa Code section 85.23;
3. If so, whether the injury caused temporary disability and the extent;
4. If so, whether the injury caused permanent disability and the extent;
5. The proper weekly rate of compensation;
6. Payment of medical expenses;
7. Payment of claimant's independent medical examination under Iowa Code section 85.39
8. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and
9. Taxation of costs.

FINDINGS OF FACT

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

At the time of hearing, claimant was a 33-year old person. (Hearing Transcript, p. 16) Claimant is not married, but lives with his long-term girlfriend and their three children. (Defendants' Exhibit M, Deposition Transcript, p. 7) Claimant was born and raised in Hawaii, and graduated from high school in 2007. (Tr., p. 17) He has no other formal education or training. After high school, claimant worked for Grace Pacific Rocky Mountain as a mason. (Tr., p. 18) After about one year, he went to work at Tru Touch, a renovation company, doing general carpentry and plumbing duties. (Tr., p. 19) Claimant's next job was with a company called American Industrial, where he mainly did fire watch duties. (Def. Ex. M, Dep. Tr., p. 14) He described that job as logging paperwork for other workers going into and out of confined spaces at electric plants, and watching for fires. (Def. Ex. M, Dep. Tr., pp. 14-15) He worked there over the course of several years, but said it was not steady work, as there were often shutdowns. (Def. Ex. M, Dep. Tr., p. 15)

Claimant moved to Iowa from Hawaii on March 1, 2019. (Tr., p. 20) Claimant's first job after moving to Iowa was at Bowie International, where he started working on September 16, 2019. (Def. Ex. A, p. 1; Ex. M, Dep. Tr., p. 18) Claimant was hired as an assembly worker, and the job description states the position "operates handheld power

tools and outfits doors, tanks, and various units with hardware before they are installed on units." (Def. Ex. A, p. 3) Claimant explained that the company builds dog boxes for Humane Society trucks, and his job was mainly to build the doors for the boxes, and also the fiberglass water tanks for the trucks. (Def. Ex. M, Dep. Tr., pp. 18-24) He described the job as slow-paced, and not particularly repetitive. (Def. Ex. M, Dep. Tr., pp. 20; 25; Tr., pp. 21-22) The job was not labor-intensive, and claimant worked there for about six months. (Tr., pp. 21-22)

Claimant's last day at Bowie was March 19, 2020, and his first day at Essentia was March 23, 2020. (Def. Ex. A, p. 4; Tr., p. 22) Claimant was hired as a production operator. He completed a pre-employment physical on March 5, 2020, which he passed. (Def. Ex. D, pp. 13-15) Claimant's job duties essentially consisted of operating a machine that filled and sealed 50-pound bags of dry, powdered protein product. (Def. Ex. M, Dep. Tr., p. 40) The machine dispensed the product into a bag, after which claimant would place the bag through an automated sealer machine. Once the bag was sealed, he would carry the 51.4-pound[1] bag to a pallet, where 36 bags would be stacked. (Def. Ex. M, Dep. Tr., p. 41) Claimant worked 12-hour overnight shifts, and testified that most nights he would complete 10 to 13 pallets. (Def. Ex. M, Dep. Tr., p. 44; Tr., pp. 30-31)

Claimant described the bagging position as fast-paced. (Tr., p. 75; Def. Ex. M, Dep. Tr., p. 43) Defendants provided two videos taken in the bagging room where claimant worked. (Def. Ex. N; Tr., p. 133) The first video is dated April 29, 2021, and is security footage that shows essentially the entire room. (Def. Ex. N) The second video is not dated, but it a close-up video of a worker performing the bagging duties that was filmed by another worker at the plant. (Tr., p. 133) From the videos, it appears the entire process of filling, sealing, and stacking one bag takes somewhere between two and two and one-half minutes. The job does not appear to be particularly fast-paced. Claimant testified that the videos are not an accurate representation of his job duties, because the videos show new bagging and sealing machines that were put into operation in July 2020, about one month prior to the end of claimant's employment. (Tr., pp. 24-25) Claimant testified that on the older machines, he would have to carry each bag from the machine to a platform near the sealer, while the video shows a conveyor-belt system that takes each bag from the machine to the sealer. (Tr., p. 27) Claimant also testified that one of the old machines did not have a sealer, requiring him to carry bags between the machines more frequently. (Tr., p. 25)

Jack Wolf testified on behalf of defendants. Mr. Wolf is the plant manager at Essentia and has been there since June of 2015. (Tr., p. 131) Mr. Wolf testified that there are only a couple differences between the older and newer bagging machines. (Tr., p. 134) First, when the bag is filled with product, the old machines had a foot pedal clamp that held the bag in place. The new machines have a bag that inflates and holds the bag in place. (Tr., p. 134) Second, the new machines have a short conveyor belt between where the bag is filled with product and the sealing machine. (Tr., pp. 134-135)

[1] Each bag contained 50 pounds of product plus tare weight of 1.4 pounds. (Tr., p. 147)

Previously, there was a stainless steel table in that place, and employees would manually slide the bags across the table to the sealing machine. (Tr., pp. 136; 148) Mr. Wolf also testified that he would not consider the bagger position to be a "fast-paced" job, and there are no specific quotas for employees. (Tr., pp. 137-138) At his deposition, claimant disagreed that the employees would slide the bags to the sealer. (Def. Ex. M, Dep. Tr., p. 41) He indicated that employees had to carry the bags to keep them from falling and spilling.

Claimant's testimony regarding the onset of his symptoms is somewhat inconsistent. At his deposition, which took place on February 23, 2021, claimant testified that he started to have complaints in his hands about a month to a month-and-a-half after he started his job at Essentia. (Def. Ex. M, Dep. Tr., p. 47) At hearing, he testified similarly on direct examination. (Tr., pp. 35-36) However, on cross-examination, claimant testified that he first started to experience numbness in his hands on or around April 3, 2020, about 10 days after he started at Essentia. (Tr., pp. 61-62) Claimant then stated that the month or month and a half after starting was when he first told his supervisor, Jason Lamaak, that his hands were bothering him. (Tr., p. 62)

Looking to the medical records, claimant saw Elizabeth Halbur, PA-C, on April 3, 2020; ten days after he started at Essentia. (Joint Exhibit 2, p. 50) At that time, he reported back pain, as well as "right wrist numbness." The record states that he had been experiencing numbness in his right palm and all five fingers "for the past week or two," and that this was a new problem. (Jt. Ex. 2, p. 50) Ms. Halbur referred claimant for an EMG, "for suspected carpal tunnel vs cubital tunnel syndromes." (Jt. Ex. 2, p. 53)

Claimant was seen at McFarland Clinic by Edward Clemmons, D.O., on May 5, 2020. (Jt. Ex. 3, p. 63) At that time, he reported bilateral hand symptoms, right worse than left. The records note that "for the better part of the last month, since changing to a new job at Essential (sic) Proteins and grabbing 50-pound bags at a time, he has had a lot more difficulty with closing of his right hand and waking up with it in the morning being completely numb." (Jt. Ex. 3, p. 63) Dr. Clemmons noted that he may have carpal tunnel syndrome, which would be evaluated with an EMG. (Jt. Ex. 3, p. 64) However, claimant also had some symptoms of joint pain and stiffness that Dr. Clemmons felt were primarily musculoskeletal in nature. (Jt. Ex. 3, p. 64) He noted claimant's history of right hand injuries, including a broken index finger, and surgery on his knuckle. (Jt. Ex. 3, p. 63)

Claimant does have a history of injuries to his right hand. When he was 7 years of age, he was struck by a "glancing blow" of a car. He sustained a laceration over the radial aspect of his thumb at the level of the MP joint, and a laceration over the dorsal distal phalanx of his right ring finger. (Jt. Ex. 1, p. 1) The lacerations extended into some tendons, so he had repair of the APB and EPB tendons of his right thumb. (Jt. Ex. 1, p. 1) After that, there were several instances in claimant's teenage years and early 20s in which he reported right hand injuries due to fighting or punching walls. At age 16 he sustained a "boxer's fracture" of his right hand. (Jt. Ex. 1, p. 3) He sustained lacerations from human bites to his right hand at ages 17 and 19, again due to fights. (Jt. Ex. 1, pp.

4-6) At age 25, he sustained a fracture at the second metacarpal of his right hand due to punching a concrete wall. (Jt. Ex. 1, p. 7) Later that same year he reported left wrist pain, again due to punching a wall. (Jt. Ex. 1, p. 10) While these injuries all appear to have healed, Dr. Clemmons did note them.

The EMG took place on May 5, 2020, and in an addendum dated May 6, 2020, Dr. Clemmons noted that the EMG showed "evolving moderate CTS [carpal tunnel syndrome] bilaterally." (Jt. Ex. 3, p. 65) Dr. Clemmons also noted that some of claimant's symptoms, such as joint pain and stiffness, were "more akin to a rheumatologic, musculoskeletal problem whose inflammation could potentiate a compressive neuropathy." (Jt. Ex. 3, p. 65) As such, he was referred to Iowa Arthritis and Osteoporosis Center for an evaluation.

Claimant testified that after this visit with Dr. Clemmons at McFarland, he was advised of the carpal tunnel diagnosis. (Def. Ex. M; Depo. Tr., p. 55; Tr., pp. 41, 67-68) He further testified that at that time he the thought his job duties were causing the problems with his hands. (Tr., p. 68) This is consistent with his report to Dr. Clemmons that he had developed problems with his hands since changing to a new job at Essentia. (Jt. Ex. 3, p. 63) Dr. Clemmons further noted claimant's condition may require surgery. (Jt. Ex. 3, p. 64) As of May 6, 2020, claimant knew of the nature, seriousness, and probable compensable character of his condition. As such, I find that claimant's injuries to his bilateral hands and wrists manifested on May 6, 2020.

Claimant next saw Lawrence Rettenmaier, M.D., on June 12, 2020, at Iowa Arthritis & Osteoporosis Center. (Jt. Ex. 4, p. 70) Dr. Rettenmaier noted claimant's EMG/NCV showed bilateral carpal tunnel syndrome. His record indicates claimant had been doing repetitive work for a year, with a lot of lifting.[2] He further notes claimant's "[h]ands have bothered him the last couple of months, has not reported a work comp [injury]." (Jt. Ex. 4, p. 70) He then states that claimant said he had done physical labor in the past "but never repetitive nature work like he is doing now." (Jt. Ex. 4, p. 70) Dr. Rettenmaier also noted claimant's history of injury and infection in his right middle finger MCP joint that required surgery.

After examination, Dr. Rettenmaier's impression was multifactorial bilateral hand pain. (Jt. Ex. 4, p. 73) He noted claimant "certainly" has carpal tunnel, and possibly also some symptomatic flexor tendinitis and posttraumatic degenerative changes in his right middle finger MCP joint. He further stated that claimant does not have clear-cut inflammatory arthritis but he would check the lab work. Dr. Rettenmaier also wrote: "Question some of this is work related. Obviously he has not been doing well with repetitive activities." (Jt. Ex. 4, p. 73) Dr. Rettenmaier advised claimant to wear a wrist splint at night, and "reviewed he certainly can report to the employer." (Jt. Ex. 4, p. 74) In the meantime, claimant was told to follow up with his primary care physician and see orthopedics if his condition did not improve in three to four weeks. (Jt. Ex. 4, p. 74)

[2] Claimant denies he told Dr. Rettenmaier he had been doing repetitive work for a year. (Tr., pp. 71-72)

After seeing Dr. Rettenmaier, claimant continued working until August 12, 2020. On that day, claimant testified that he could no longer pick up the bags while working, they kept sliding from his hands. (Tr., p. 45) As he could no longer physically perform the job, he had to report the injury to his employer. However, claimant also testified that prior to August 12, 2020, he reported the injury, but nothing was done.

Claimant's testimony regarding when he reported the injury to his employer is also inconsistent. At his deposition, claimant acknowledged that he reported his injury on August 12, 2020. (Def. Ex. M, Dep. Tr., p. 50) However, he also stated that he told Mr. Lamaak about his hands at an earlier time, and Mr. Lamaak told him he would just have to get used to the machine. (Def. Ex. M, Dep. Tr., pp. 49-50)

Claimant testified that the earlier conversation with Mr. Lamaak was witnessed by Justin Thorpe and his wife, Megan Thorpe, who were coworkers. Mr. Thorpe and claimant are also friends outside of work, and have gone fishing together. (Tr., pp. 78-79) Justin Thorpe was a "team lead red hat," which is one step below Mr. Lamaak. (Tr., p. 125) His responsibilities included helping Mr. Lamaak run his shift, and also reporting any accidents or injuries and making sure safety rules are being followed. (Tr., p. 125) If Justin learned of a worked injury, he would have a responsibility to report it to Mr. Lamaak. However, claimant stated that when he told Justin about his hands bothering him, Justin told him not to report the injury, because he would end up being fired. (Tr., pp. 43-44)

Claimant has repeatedly stated that he cannot remember precisely when he told Mr. Lamaak about his hands, and was told to "just get used to" the machine. However, the level of inconsistency in his testimony is concerning. At his deposition, he first stated the conversation was before he first saw a doctor for his hands. (Def. Ex. M, Dep. Tr., p. 53) After being reminded that he first saw a doctor on April 3, 2020, claimant could not remember if that was around the same time he spoke to Mr. Lamaak. (Def. Ex. M, Dep. Tr., p. 54) Claimant then testified that after seeing Dr. Clemmons at McFarland Clinic, he knew he had carpal tunnel syndrome, but "I never, like, reported them at first, because Justin [Thorpe] wrote to me saying that everybody who report work injuries at Essentia normally get fired. So at the time being, I was scared of getting fired. But I report them afterwards because they kept just slamming me on the bag machine when they know my hands was already sore." (Def. Ex. M, Dep. Tr., pp. 55-56) Later in his deposition, he testified that while he knew he had carpal tunnel after seeing Dr. Clemmons in May, he did not find out it was work related until he saw Dr. Rettenmaier in June. (Def. Ex. M, Dep. Tr., pp. 82-83) He was then asked when he knew his condition was serious enough that he could no longer perform his job, and he said before he filed the work injury report in August. (Def. Ex. M, Dep. Tr., p. 84) He then immediately said "Well, before that time period is when – that's when I report to Jason [Lamaak], but I still had to bag regardless." (Def. Ex. M, Dep. Tr., p. 84)

At hearing, claimant first testified that it was after about a month to a month and a half after he started working that he told Mr. Lamaak about his symptoms. (Tr., p. 38) Again, he testified that Justin and Megan Thorpe witnessed this conversation, and Mr.

Lamaak told claimant he had to get used to the machine. (Tr., p. 39) He further testified that at some point after that he asked Mr. Lamaak if he could perform a different job other than bagging, and was told no. (Tr., p. 40) A few minutes later, he testified that it was after his visit with Dr. Rettenmaier that he told his supervisor, Mr. Lamaak, that his hands were bothering him. (Tr., p. 42) He then stated that on August 12, 2020, he reported the injury because he was no longer able to perform his job. (Tr., p. 45) He stated "The reason why I didn't want to report it because I have a family of three kids and I needed the money, but I just couldn't take it no more." (Tr., pp. 45-46)

On cross-examination, claimant's testimony regarding the timeline shifted. First, he stated that he told Mr. Lamaak about his symptoms about a month and a half after he started, which would be early to mid-May. (Tr., pp. 62-63) He further admitted that on May 5, 2020, he knew he had carpal tunnel syndrome and he thought his job duties were the cause. (Tr., p. 68) He then testified that it was not until after he saw Dr. Rettenmaier that he told Mr. Lamaak about his symptoms, which was not until June. (Tr., pp. 69-70) That is consistent with Dr. Rettenmaier's record, which stated that claimant had not yet reported a workers' compensation injury. (Jt. Ex. 4, p. 70) Claimant then admitted, however, that he did not report a work injury until August 12, 2020. (Tr., p. 71) Again, a bit later, claimant testified that he told Justin and Megan Thorpe that he was seeing doctors on his own for carpal tunnel, but they told him not to report it or he would get fired, "so that's why I didn't report them right away." (Tr., p. 78) He then repeated his earlier testimony that Mr. Lamaak was also present, and told him to get used to the machine.

Megan Thorpe was called as a witness for claimant. (Tr., p. 96) Ms. Thorpe testified that she started working at Essentia toward the end of August, 2019. Her husband, Justin, had worked there for six or seven months prior to her starting. Her position was a dry room operator, and prior to that she had also worked in the bag room. (Tr., pp. 96-97) Ms. Thorpe testified that while she does still have some contact with claimant, they do not talk often. (Tr., p. 110) Claimant is friends with her husband, however. (Tr., pp. 110) Ms. Thorpe could not remember the exact date, but testified that she did recall a conversation between herself, her husband Justin, claimant, and Mr. Lamaak, in which claimant said he was having a lot of pain in his wrists. (Tr., p. 101) She stated that Mr. Lamaak's response was that he needed to get used to the bagger, and the four of them then had a conversation about not reporting injuries at Essentia because "you will get terminated for it." (Tr., pp. 101-102) She testified that Mr. Lamaak told them that his own father had been terminated from Essentia because of an injury. (Tr., pp. 101-102) She thought the conversation may have occurred in June or July, but could not remember with certainty. (Tr., pp. 101; 111)

Ms. Thorpe and her husband were both terminated from employment at Essentia on February 4, 2021. (Tr., pp. 106-108; Def. Ex. L) Ms. Thorpe's termination letter indicates that she provided inconsistent statements during an investigation, interrupted a meeting between her supervisor and a coworker and refused to leave his office, and used disrespectful and inappropriate language during that interaction. (Def. Ex. L, p. 40) As such, she was terminated for insubordination and falsification of company records.

Mr. Thorpe's letter indicates he also provided inconsistent statements and falsified information in his statements, and intentionally omitted facts during an investigation. (Def. Ex. L, p. 39) Ms. Thorpe testified that the investigation had to do with a sexual harassment report she made against another employee that Mr. Lamaak was training. (Tr., p. 106) Mr. Thorpe was not called as a witness at hearing.

Ms. Thorpe and her husband both provided handwritten statements for claimant dated February 8, 2021; four days after their termination from employment. (Cl. Ex. 2, p. 2) Ms. Thorpe stated that she was standing at the "red zone line" when claimant reported to their supervisor Jason (Lamaak) that his hands were hurting. She stated that Mr. Lamaak's response was that he needed to get used to the bagger. She further stated that claimant made "us" aware that he was going to report the incident, and was told by Justin (Thorpe), in front of Jason (Lamaak), that "Essentia is known for firing people that report things like that." (Cl. Ex. 2, p. 2)

Mr. Thorpe's written statement is similar. He states that claimant, himself, and Megan (Thorpe) were standing at the red zone line when claimant reported to Jason (Lamaak) that his hands were hurting. He said Jason responded that he needed to get used to bagging. He said claimant told him that he was going to report it, and Mr. Thorpe told claimant "I don't know if I would do that cause they fire alot (sic) of people for reporting incidents." (Cl. Ex. 2, p. 2) Neither statement provided dates or estimated dates as to when the alleged conversation occurred.

Jason Lamaak also testified at hearing. Mr. Lamaak has been employed at Essentia for 12 years, and has been in the production supervisor position for 3 years. (Tr., p. 113) He was claimant's direct supervisor. (Tr., p. 114) Mr. Lamaak adamantly denied that claimant ever reported any complaints to him regarding his hands or arms until August 12, 2020. (Tr., pp. 114-116; 122-124; 130) He denied claimant ever asked him to put him in a different position other than bagger. (Tr., p. 116) He further denied telling claimant he needed to get used to the machines or get used to bagging, and stated that is not something he would ever say. (Tr., pp. 123-124) He also testified that his father was not terminated from employment with Essentia because of a work injury. (Tr., pp. 129-130) Rather, his father was injured at home, and could no longer fulfil his job duties, so he was let go after going on long-term disability. (Tr., pp. 129-130)

I find Jason Lamaak provided highly credible testimony at hearing. His demeanor, eye contact, and rate of speech was appropriate, and he did not engage in any furtive movements. I find his testimony reasonable and consistent with the other evidence I believe. That being said, I do not find claimant to be a credible witness. His testimony was inconsistent throughout both his deposition and at hearing. His testimony was also inconsistent with the medical records, and other testimony and evidence in the record. Likewise, I do not find Megan Thorpe to be a credible witness. Her testimony and written statement are both tainted by the fact that she was previously terminated from Essentia for insubordination and falsification of company records, as well as her husband's friendship with claimant. Likewise, I do not find Mr. Thorpe's written statement to be persuasive, given that he was also terminated for providing inconsistent

statements, falsifying information, and intentionally omitting facts during an investigation. Combined with his friendship with claimant, and the fact that he did not testify at hearing, Mr. Thorpe's written statement is given no weight. I find that claimant did not report a work injury until August 12, 2020.

Another important factor in finding Mr. Lamaak credible is what occurred when claimant did report the injury on August 12, 2020. As noted above, claimant worked an overnight shift. He reported a work injury around 8:00 p.m. on August 12, 2020. (Tr., p. 129; Def. Ex. H, p. 22) Claimant reported that he had seen his own doctor two-months prior for carpal tunnel. (Def. Ex. G, p. 21; H, p. 22) Mr. Lamaak immediately followed company protocol, and reported the injury to the company nurse line that same night. (Def. Ex. G, pp. 19-21) As no clinics were open at the time, Mr. Lamaak was advised to have claimant schedule an appointment the next morning to be seen that day. (Def. Ex. G, p. 21)

On the morning of August 13, 2020, while claimant was still on his shift, he was called into the front office and given a final written warning for failing to report a workplace injury. (Tr., p. 118; Def. Ex. H, p. 22) Since claimant had seen his own medical providers and waited several months prior to reporting the injury, it was considered a violation of company policy. (Tr., pp. 117-118) Page 19 of the employee handbook requires that all workplace injuries be reported immediately, and failure to do so may result in a final written warning. (Tr., pp. 118, 141; Def. Ex. F, p. 18; I, p. 27) During that meeting, claimant used inappropriate language. (Tr., pp. 81, 142-143; Def. Ex. H, p. 23; I, p. 26) Mr. Wolf reminded claimant to watch his language. (Tr., p. 143; Def. Ex. I, p. 26)

Claimant saw Leszek Marczewski, M.D., at UnityPoint Family Medicine Sac City, on August 13, 2020, at about 2:45 p.m. (Jt. Ex. 5, p. 76) Dr. Marczewski noted that claimant was previously evaluated and told he had bilateral carpal tunnel. He recommended that claimant have an orthopedic consultation for carpal tunnel release, and stay on light duty until the surgery is performed. (Jt. Ex. 5, pp. 76-78)

Claimant returned to work for his next scheduled shift that same evening. Around 7:45 p.m., claimant had a meeting with Mr. Lamaak and a co-worker, Gary Beckwith. (Tr., p. 119; Def. Ex. H, pp. 24-25) Claimant testified that during the meeting, he asked Mr. Lamaak why he did not tell Mr. Wolf that claimant had previously reported his hands to him, and Mr. Lamaak said "Oh, you didn't tell me nothing." (Tr., p. 50) Claimant said Mr. Lamaak then started making "funny faces" toward him so he then told Mr. Lamaak "You guys got a cartoon operation going on." (Tr., p. 50) Mr. Lamaak denies making any faces at claimant, and testified that claimant actually said "we don't know what kind of a cock bite operation we run at our plant." (Tr., pp. 119-120) Both Mr. Lamaak and Mr. Beckwith completed written statements after the meeting reflecting the language they believe claimant used. (Def. Ex. H, pp. 24-25) Mr. Lamaak then met with Mr. Wolf the next morning, explained the language claimant had used, and Mr. Wolf determined that claimant's employment should be terminated for violating the company's code of

conduct. (Tr., pp. 142-143) As such, claimant's employment was terminated on August 14, 2020. (Def. Ex. I, pp. 26-27)

Claimant filed a petition on September 23, 2020. Defendants issued a letter to claimant's attorney, denying his injury claims, on October 13, 2020. (Cl. Ex. 1, p. 1) Claimant then returned to his primary care clinic on October 28, 2020, and was given a referral to an orthopedic specialist for his carpal tunnel syndrome. (Jt. Ex. 2, p. 57)

Claimant saw Steven Meyer, M.D., at CNOS on November 18, 2020. (Jt. Ex. 8, p. 86) Dr. Meyer indicated that claimant "worked in a very laborious job with significant bilateral upper extremity demands." (Jt. Ex. 8, p. 86) He described claimant's job as lifting 50-pound bags once full onto a conveyor belt to be sealed. He noted numbness in claimant's index and long fingers and thumb for at least six months. He also noted claimant recently had an EMG/NCV test that revealed significant bilateral median nerve compression at the wrist, consistent with bilateral carpal tunnel syndrome. (Jt. Ex. 8, p. 86) Dr. Meyer recommended sequential bilateral carpal tunnel release surgeries. (Jt. Ex. 8, p. 87)

Claimant had right carpal tunnel release surgery on December 23, 2020. (Jt. Ex. 6, p. 80) At his first post-operative visit with Dr. Meyer on January 13, 2021, he was not wearing his splint, and told Dr. Meyer that the nurse told him to take the splint off after three days. (Jt. Ex. 8, p. 89) Dr. Meyer questioned the validity of that statement. He noted, however, that claimant was feeling much better, but had concerns about his incision. On examination, Dr. Meyer found claimant's incision was gaped a bit because of profound callus in his palm. His sensation was excellent in his index and long finger. He was placed in a cock-up wrist splint, and told to follow up the next week. (Jt. Ex. 8, pp. 89-90)

Claimant followed up with Dr. Meyer on January 20, 2021. (Jt. Ex. 8, p. 91) His incision was healing reasonably well. Dr. Meyer indicated they would proceed with left carpal tunnel release. Dr. Meyer also stated that they discussed claimant's workers' compensation claim. He stated that after listening to claimant's job description of "repeatedly lifting 50-pound bags for 10-hour days," carpal tunnel at claimant's age is "within a reasonable degree of medical certainty definitely work related." (Jt. Ex. 8, p. 91)

Claimant had left carpal tunnel release surgery on February 9, 2021. (Jt. Ex. 7, p. 81) On February 10, he called Dr. Meyer's office seeking oxycodone for his pain, stating that the Tylenol 3 he was sent home with did nothing for his pain. (Jt. Ex. 8, p. 92) When claimant was informed he would not be prescribed oxycodone, the nurse's note indicates he became very upset, swearing at her and using very foul language and hung up on her. (Jt. Ex. 8, p. 92) Claimant called again on February 11, again asking for something stronger, but was again told no. (Jt. Ex. 8, p. 93) At hearing, claimant testified that he was not angry at the nurse or directing profanity toward her, but rather was just "speaking out loud" about the situation. (Tr., pp. 81-82)

Claimant next followed up with Dr. Meyer on February 24, 2021. (Jt. Ex. 8, p. 94) At that time, claimant was doing well, with his only continuing symptom being numbness in his left thumb. Dr. Meyer also noted that his right carpal tunnel release continued to make excellent progress as well, with "complete resolution of his numbness and complete return to function without compromise." (Jt. Ex. 8, p. 94) Claimant's final follow up visit was on April 14, 2021. (Jt. Ex. 8, p. 95) At that time, he was doing "reasonably well." He had excellent grip strength. He still had some mild bilateral pillar tenderness and slightly decreased sensation at the tip of the index and long fingers bilaterally. Dr. Meyer noted he had a satisfactory outcome from the surgeries, with ongoing inflammation in both hands. He advised claimant to take two Aleve twice a day for six weeks, and to aggressively work on strength and range of motion. He released claimant to see him on an as-needed basis. (Jt. Ex. 8, p. 95)

On March 15, 2021, Dr. Meyer responded to a letter authored by claimant's attorney. (Cl. Ex. 6, p. 17) Dr. Meyer agreed that claimant's work duties at Essentia were a substantial aggravating factor in his bilateral hands and wrists becoming symptomatic, which resulted in the need for medical treatment. He further agreed that following each surgery, it would likely take 8 to 12 weeks for claimant to return to full activity or reach maximum medical improvement (MMI). (Cl. Ex. 6, p. 17)

Claimant attended an independent medical evaluation (IME) with Sunil Bansal, M.D., on May 3, 2021. (Cl. Ex. 7, p. 19) His report is dated May 31, 2021. (Cl. Ex. 7, p. 37) Dr. Bansal reviewed the medical records, and interviewed and examined claimant. He also reviewed the videos of the bagging job at Essentia. (Cl. Ex. 7, p. 31) Subjectively, claimant advised Dr. Bansal that he "had been working [at Essentia] for five months, but after a month and a half of doing the job he started to develop numbness and tingling of both hands." (Cl. Ex. 7, p. 31) He told Dr. Bansal that both of his hands were still sensitive, particularly the left, and that he had "fairly constant numbness/tinging of both hands." (Cl. Ex. 7, p. 31) He continued to complain of symptoms when lying down to sleep, and noted a weak grip strength.

On physical examination, Dr. Bansal noted mild tenderness to palpation of the volar aspect of the wrist bilaterally. (Cl. Ex. 7, pp. 31-32) Claimant had full range of motion of the wrists bilaterally, and some loss of sensory discrimination over the thumb, index, and long fingers bilaterally as well. (Cl. Ex. 7, p. 32) Grip strength was measured, and his left hand was slightly weaker than his right. (Cl. Ex. 7, p. 33)

Dr. Bansal provided impairment ratings of both hands/wrists using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. 7, pp. 33-34) For the right hand/wrist, Dr. Bansal based impairment on claimant's "digital sensory deficits." (Cl. Ex. 7, p. 33) He calculated 4 percent permanent impairment of the upper extremity, which is equal to 2 percent of the body as a whole. (Cl. Ex. 7, pp. 33-34) For the left wrist/hand, he again based impairment on digital sensory deficits, and provided a 6 percent upper extremity impairment, which is equal to 4 percent of the body as a whole. (Cl. Ex. 7, p. 34)

With respect to causation, Dr. Bansal again noted that after a month and a half of working the bagging job, claimant began to develop numbness and tingling in both hands. (Cl. Ex. 7, p. 34) He reviewed the videos of the bagger position, and opined that the work claimant was engaged in at Essentia was capable of increasing carpal tunnel pressures. He noted that the job would place "significant pressure on the wrists based on repetition and the angle in which he would position his wrists while grabbing, gripping, and lifting hundreds of 50-pound bags throughout his 12-hour shift." (Cl. Ex. 7, p. 34) Dr. Bansal stated that based on the National Institutes for Occupational Safety and Health (NIOSH), claimant's job duties qualify as having a strong potential to cause carpal tunnel syndrome, involving the variables of repetition and force. (Cl. Ex. 7, p. 35)

Dr. Bansal also reviewed the report of Douglas Martin, M.D., which is discussed further below. (Cl. Ex. 7, p. 35) Dr. Bansal disagreed with Dr. Martin's conclusions regarding causation, specifically stating that claimant's job was repetitive enough to be considered a risk factor in carpal tunnel. Specifically, the rate of lifting one bag approximately every two minutes equals several hundred bags over the course of a day. Dr. Bansal also noted "equation force," as the bags claimant lifted weighed 50-pounds each. He concluded that while claimant's work "was not an extreme of cycle and rate, the other variable of force was at a high level." Therefore, in combination, the job task would be a risk factor. (Cl. Ex. 7, p. 35)

Dr. Bansal noted that claimant "may need" revision carpal tunnel surgery on the left in the future. He agreed with Dr. Meyer that claimant reached MMI on April 14, 2021. Finally, he recommended that claimant not lift greater than 10-pounds with either hand, and avoid frequent gripping, turning, and twisting with either hand. (Cl. Ex. 7, p. 35)

Defendants had claimant attend an IME with Dr. Douglas Martin on May 18, 2021. (Def. Ex. K, p. 31) Dr. Martin reviewed medical records, claimant's job descriptions from both Bowie International and Essentia, and claimant's deposition transcript. He also reviewed the video footage of the bagging job. Dr. Martin interviewed claimant, who stated that he began to have problems with numbness and tingling in his bilateral hands approximately one and a half months after he started working at Essentia. (Def. Ex. K, p. 32) Dr. Martin then states: "In looking through the data, it appears that his start of employment was May 23, 2020. I verified with him that what he is saying is he started to have symptoms in July of 2020." (Def. Ex. K, p. 32) Claimant's actual start date at Essentia was March 23, 2020. However, this may have been a typographical error, as Dr. Martin then notes that claimant presented to a healthcare provider at McCrary Rost Clinic "days after he started his employment at Essentia." (Def. Ex. K, p. 32) Presumably, he is referring to the April 3, 2020 visit with PA-C Halbur. (Jt. Ex. 2, p. 50)

In any event, Dr. Martin reported that claimant stated he continued to have a degree of volar wrist discomfort and stiffness, but that the numbness and tingling he was experiencing had improved. He still had some loss of sensation in the fingertips of his index and middle fingers. He "no longer has nighttime awaking." (Def. Ex. K, p. 32)

Dr. Martin reviewed claimant's occupational history, and again stated that claimant started working at Essentia on May 23, 2020. (Def. Ex. K, p. 33) After reviewing the video of claimant's job duties, he opined that it would be considered a low repetition position. He noted that the entire process for each 50-pound bag took about two to two and one-quarter minutes. No tool use is required. He stated that the cycle time with respect to gripping would be termed minimal, and there is no unusual posturing of the hands that he could identify. (Def. Ex. K, p. 33) He further noted that the job description for Bowie International included a requirement for tool use.

On physical examination, Dr. Martin found some decreased sensory discrimination over the thumb, index, and middle fingers bilaterally. (Def. Ex. K, p. 34) He did manual muscle testing, which showed 5 of 5 grip strength. However, he found the grip strength dynamometer testing to be invalid, as it demonstrated inconsistency of effort compared to manual muscle testing. (Def. Ex. K, p. 34) He opined that claimant's prognosis was good, and had no additional treatment recommendations related to the carpal tunnel syndrome. (Def. Ex. K, p. 35)

With respect to causation, Dr. Martin based his opinion on "review of the medical documentation as presented as well as interview with the examinee and then the information as it is applied to the current evidence-based literature that is published on the subject." (Def. Ex. K, p. 35) He then turned to the AMA Guides to the Evaluation of Disease and Injury Causation, Second Edition.[3] Dr. Martin then explains that in order for there to be an occupational correlation for carpal tunnel syndrome, there needs to be a combination of risk factors such as high force and high repetition, or high force and unusual posture together for this to exist. In addition, there is a "threshold of dose exposure" that must occur. He noted that claimant reported initial symptoms of carpal tunnel "just a few days" after beginning employment at Essentia, and other medical records suggest he may have had symptoms prior to beginning employment there. (Def. Ex. K, p. 35) That, combined with job activities that do not show a high force or high repetition or any unusual posture, led Dr. Martin to opine that there is no occupational causal correlation to claimant's work at Essentia. (Def. Ex. K, p. 35) Dr. Martin also noted a variety of non-occupational risk factors in claimant's case that effect the causation analysis, including claimant's elevated BMI, potential diabetes,[4] and history of prior injury to his right hand. (Def. Ex. K, p. 36)

Dr. Martin was asked to provide an impairment rating despite his opinion that the carpal tunnel was not work related. Using the Fifth Edition of the AMA Guides, Dr. Martin provided a 2 percent upper extremity rating to both the right and left side. (Def. Ex. K, p. 36) Dr. Martin did not believe claimant required any type of permanent restrictions, and encouraged claimant to remain normal with respect to his hand function. (Def. Ex. K, p. 37) He was asked to respond to Dr. Meyer's opinion regarding

[3] Claimant points out in his brief that the Agency has adopted the 5th Edition of the AMA Guides, and here Dr. Martin used the 2nd Edition. However, Dr. Martin's reference to the 2nd Edition involves the AMA Guides regarding causation, and the agency has only adopted the 5th edition of the guides with respect to permanent impairment. Dr. Martin did use the 5th Edition of the Guides for his impairment rating.
[4] As of the date of hearing, claimant had never been diagnosed with diabetes.

causation. Dr. Martin stated that "oftentimes orthopedic surgeons are not experts in causal correlation of causation analysis," as that is typically the realm of Occupational Medicine physicians. (Def. Ex. K, p. 37) He further noted that Dr. Meyer is likely answering causation questions from a "patient efficacy perspective," which can "cloud the picture" regarding what the science actually says. He went on to state that in reality, "there are only a few jobs" that can be proven to have a causal relationship to carpal tunnel syndrome. He also stated that it is "fairly clear" that claimant "has had a tendency to exaggerate the voracity or severity of what he does at the workplace." He noted that claimant has stated that the bagging position was a repetitive activity that requires substantial grasp and grip movements, but his review of the video showed a "low repetition type of situation with actually very minimal requirements with regards to grasp or grip capabilities." (Def. Ex. K, p. 37)

I disagree with Dr. Martin's analysis of the video evidence. The video clearly shows the employees gripping and grasping the 50-pound bags from the top of the bag. Whether the employees had to lift the bags or slide the bags to the sealing machines before they were replaced with a conveyor belt, they still had to lift the sealed bags from the sealer onto a pallet. Each pallet held 36 bags, for a total weight of about 1,800 pounds. (Tr., p. 139) Employees would stack anywhere from 7 to 12 pallets per 12-hour shift. (Tr., pp. 30-31) That is equal to 252 to 432, 50-pound bags per shift. In other words, claimant was lifting anywhere from 12,600 to 21,600 pounds of product over the course of each 12-hour shift, depending on how many pallets he completed.

Additionally, it is unclear whether Dr. Martin clearly understood when claimant started working at Essentia. He states claimant's start date is May 23, 2020, at two different points in his report. However, he also notes claimant's first appointment for carpal tunnel symptoms took place within "days" of him starting there. That appointment was April 3, 2020, meaning Dr. Martin may have understood March 23, 2020 was claimant's start date, and May 23 was a typographical error. I cannot determine whether Dr. Martin had a clear understanding of claimant's start date, and I do not believe he fully understood claimant's job duties. As such, I do not find his opinions regarding causation to be convincing.

With respect to Dr. Bansal's report, there are also some credibility issues. Dr. Bansal notes several times that claimant's symptoms began "a month and a half" after claimant started working at Essentia. It is well established, however, that at claimant's visit with PA-C Halbur on April 3, 2020, he was reporting numbness in his right wrist, palm, and all five fingers for the past week or two. (Jt. Ex. 2, p. 50) At that time, Ms. Halbur was concerned enough to order an EMG. (Jt. Ex. 2, p. 53) The EMG took place on May 5, 2020, and claimant was diagnosed with bilateral carpal tunnel syndrome on May 6, 2020. (Jt. Ex. 3, pp. 64-65) While the diagnosis was about a month and a half after claimant started working at Essentia, his symptoms began almost immediately. It is unclear whether this information would change Dr. Bansal's opinion. He had the medical record from April 3, 2020, and reviewed it in preparing his report. (Cl. Ex. 7, p. 26) However, he seems to have given more weight to claimant's statement that his symptoms began a month to a month and a half after he started, which is inconsistent

with the medical evidence. As previously discussed, claimant's testimony at both his deposition and at hearing was inconsistent regarding when his symptoms started. Because claimant's testimony was not reliable, his statements to Dr. Bansal cannot be considered accurate. As such, I cannot find Dr. Bansal's opinion regarding causation to be convincing.

This leaves Dr. Meyer. While it appears Dr. Meyer had a fairly accurate understanding of claimant's work duties, there is nothing in his records to indicate whether he knew how long claimant had been working the job when his symptoms first appeared. At his first visit with claimant on November 18, 2020, he noted claimant had been having symptoms "for at least 6 months." (Jt. Ex. 8, p. 86) However, it is not noted anywhere in Dr. Meyer's records if he knew when claimant began working at Essentia, or when exactly his symptoms first started. It does not appear that Dr. Meyer had sufficient information to make a causation determination. As such, I cannot find his opinion to be convincing either.

Because no medical evidence can provide a credible, reliable link between claimant's work at Essentia and his carpal tunnel syndrome, he has not met his burden to prove that he sustained an injury arising out of and in the course of his employment. Additionally, even if claimant's injury did arise out of and in the course of employment, it manifested on May 5, 2020, when he was told of his diagnosis. As he did not report the injury until August 12, 2020, his claim is barred by Iowa Code section 85.23.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.904(3).

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, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer 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, 128 (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 at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. 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 at 150.

A possibility of causation is not sufficient; a probability is necessary. Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (citing Holmes v. Bruce

Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries that result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact-based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever, 379 N.W.2d at 373. The Iowa Supreme Court has held the discovery rule is applicable to the notice and limitation provisions contained in Iowa Code sections 85.23 and 86.26. IBP, Inc. v. Burress, 779 N.W.2d 210, 218-19 (Iowa 2010).

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury. The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information that makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

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

In this case, claimant contends his bilateral carpal tunnel syndrome arose out of and in the course of his employment with Essentia, as a cumulative injury, which manifested on August 12, 2020, when claimant could no longer perform his job duties. Defendants argue that claimant did not prove his injury arose out of and in the course of his employment, and if it did, claimant did not provide timely notice under Iowa Code section 85.23.

I did not find claimant to be a credible witness. 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). While there was no single inconsistency that stands out as dispositive, when viewed as a whole, the number of inconsistencies significantly diminish claimant's credibility. Having weighed all the evidence, including medical records and testimony, I cannot find claimant credible.

Likewise, I did not find any of the three causation opinions offered into evidence to be based on fully accurate, reliable information. The facts provided to each provider by claimant himself are colored by his own lack of credibility. None of the three medical opinions regarding causation were afforded significant weight as a result. While it is certainly possible that claimant's condition arose out of an in the course of employment, a mere possibility is insufficient. Sanchez, 554 N.W.2d 285. Rather, the causal connection must be probable. Id. Claimant failed to present sufficiently credible evidence that his injury resulted from his work activities. Claimant did not meet his burden to prove, by a preponderance of the evidence, that his injury arose out of and in the course of his employment. As such, his claim for benefits must be denied.

Additionally, even if claimant's injury did arise out of and in the course of employment, it manifested on May 6, 2020, when he was told he had carpal tunnel syndrome. Under Iowa Code section 85.23, he had 90 days from that date to provide

his employer with notice of the injury, which is August 4, 2020. I found that claimant did not report a work injury until August 12, 2020. As such, he did not provide timely notice under the statute, and his claim is barred.

Because claimant did not prove he sustained an injury arising out of and in the course of his employment, the remaining issues, other than payment of claimant's IME expenses and costs, are moot.

With respect to claimant's IME expenses, claimant argues that he is entitled to reimbursement for his IME pursuant to Iowa Code section 85.39. In the alternative, claimant seeks reimbursement of Dr. Bansal's report as a cost.

Iowa Code section 85.39 permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Iowa Code section 85.39(2). The section also provides that an employer is only liable to reimburse the employee for the cost of an examination if the injury for which the employee is being examined is determined to be compensable. I found the injury is not compensable, as it did not arise out of and in the course of claimant's employment. As such, claimant is not entitled to reimbursement of Dr. Bansal's IME under section 85.39.

With respect to costs, assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. Given that claimant was unsuccessful on the merits of his claim, I decline to asses costs to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing in this proceeding.

The parties shall bear their own costs.

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 January, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

MaKayla Augustine (via WCES)

Aaron Oliver (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.