BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW CARFI, Claimant, vs. BRAND ENERGY SERVICES, LLC, Employer, and ILLINOIS NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5065315 A P P E A L D E C I S I O N Head Note Nos.: 1402.30, 1402.40, 1802, 1803, 2501, 2502, 2801, 2907, 4000, 5-9999

STATEMENT OF THE CASE

Claimant, Matthew Carfi, appealed from an arbitration decision filed on July 19, 2019 and from a rehearing decision regarding demeanor filed on August 7, 2020.

This case was initially heard by Deputy Workers' Compensation Commissioner Erica Fitch on May 15, 2018. Deputy Fitch was taken off her regular deputy work, including hearings, to work full time in the development and the implementation of the paperless Workers' Compensation Electronic System (WCES). Due to Deputy Fitch's unavailability, this case was delegated to Deputy Workers' Compensation Commissioner Stephanie Copley on July 9, 2019. Deputy Copley issued the arbitration decision on July 19, 2019. She issued a rehearing decision regarding demeanor on August 7, 2020.

The detailed arguments of the parties have been considered and the record of the evidence has been reviewed de novo. Upon written delegation of authority by the Workers' Compensation Commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on the behalf of the Iowa Workers' Compensation Commission.

ISSUES

Should claimant have his case reheard?

Did claimant carry his burden of proof he sustained an injury on October 25, 2016 that arose out of and in the course of employment?

Did claimant carry his burden of proof he is entitled to temporary disability benefits?

Did claimant carry his burden of proof he is entitled to permanent partial disability benefits?

Did claimant carry his burden of proof there was a causal connection between the alleged injury and the claimed medical expenses?

Did claimant carry his burden of proof that defendants are liable for penalty under Iowa Code section 86.13?

FINDINGS OF FACT

Claimant was 42 years old at the time of hearing. Claimant graduated from high school. Claimant attended some college. (Transcript pages 6-7) Claimant has worked mostly as an industrial painter. (Tr. p. 7)

Claimant worked for Brand Energy Services, LLC (Brand), as an industrial painter from November 16, 2015 through January 13, 2016; March 7, 2016 through May 20, 2016; and from June 17, 2016 through October 25, 2016. (Exhibit E, p. 5)

Claimant's job duties were generally to support ironworkers and pipefitters. The physical demands of claimant's job are found at Exhibit C. They include applying and removing painting materials as part of a crew, loading and unloading paint materials and carrying paint buckets. The job is classified as a medium physical demand level position and requires handling loads between 25 to 45 pounds. (Ex. C)

Claimant described the job as physically demanding and involved climbing, bending, stooping, and using grinders and hand sanders. (Tr. p. 16) Claimant testified he was required to wear a harness as much of the painting was done off ground level. Claimant also had to carry a bucket of tools. Claimant testified the bucket of tools weighed approximately 10 to 15 pounds. (Tr. pp. 13, 57)

Claimant testified he began having difficulty walking during his shift on July 19, 2016. He said two of his foreman saw him limping. Claimant said they asked him about the limp. Claimant said he told them "I don't know what is going on. I just know it started hurting really bad." (Tr. pp. 26, 30) Claimant was instructed to go to the emergency room. (Tr. p. 26)

On July 19, 2016, claimant was seen at Fort Madison Community Hospital Emergency Room with complaints of left leg pain. He indicated the pain began a month prior. Claimant was assessed as having a hamstring strain. He was treated with medications. (JE 1, pp. 1-3)

Claimant testified he returned to work the next day. He said his pain worsened to the point his employer would not allow him to return until he had gotten a doctor's release. (Tr. pp. 26-27)

Claimant said he went to see a chiropractor to get a work release. On August 3, 2016, claimant was evaluated at Wondra Chiropractic for a chronic left thigh complaint of unknown origin since June 30, 2016. Claimant was assessed as having lumbago with sciatica on the right side. (JE2, pp. 7-9) Claimant testified he obtained a work release from the chiropractor. (Tr. p. 32)

Claimant testified another foreman told him to see another doctor for a work release. (Tr. p. 33) On August 9, 2016, claimant was evaluated by Jeffrey Juhl, D.O. Claimant reported left leg pain for one month. Claimant indicated he woke up with leg pain one day. (JE3, p. 13) Claimant indicated that one year prior, he fell 16 feet from a steel infrastructure onto a car. Claimant said he did not have a long-term injury from this fall. Claimant was given an epidural steroid injection (ESI) on August 9, 2016 and August 29, 2016 by Dr. Juhl. (JE3, pp. 13, 18)

Claimant returned to work and continued to work for Brand. He testified that on October 25, 2016, he had a sudden increase in pain and was unable to walk to a break room. Claimant said he was terminated on October 25, 2016. (Tr. p. 36)

On November 3, 2016, claimant was evaluated at Great River Orthopedic Specialists. Claimant indicated back pain in January that went into the left lower extremity. An MRI was recommended. (JE5, pp. 23-25) Claimant underwent an MRI that showed degenerative joint and disc disease of the lumbosacral spine. (JE5, p. 26)

On December 2, 2016, claimant was evaluated by Robert Foster, M.D., an orthopedic surgeon. Claimant had ongoing left leg and back pain for several months. Surgery was discussed and chosen as a treatment option. (JE5, p. 27)

On December 26, 2016, claimant had a lumbar laminectomy at the L5-S1 levels. Surgery was performed by Dr. Foster. (JE6, p. 55)

Following surgery, claimant had physical therapy. Physical therapy notes on January 20, 2017 indicate claimant began experiencing lower back pain in January of 2016 and his left leg pain began in February of 2016. (JE1, p. 4)

On February 3, 2017, claimant returned to Dr. Foster in follow up care. Claimant noted minimal improvement with his symptoms. A second surgery was discussed and chosen as a treatment option. (JE5, pp. 45-47)

On February 10, 2017, claimant underwent a laminectomy and decompression at the L4-5 levels. A revision of the L5 hemilaminectomy and an L5-S1 partial facetectomy was also performed. Surgery was performed by Dr. Foster. (JE6, p. 60)

On February 22, 2017, claimant returned to Dr. Foster with complaints of increased pain following surgery. Claimant had right and left-sided complaints. Claimant was referred to the University of Iowa Hospitals and Clinics (UIHC) for evaluation. (JE5, pp. 50-52)

On March 9, 2017, claimant was evaluated by Andrew Pugely, M.D., at the UIHC. A new MRI was recommended. It showed claimant had a disc herniation at the L2-3 levels. Surgery was discussed, but claimant declined a third surgery. (JE8, pp. 78-80)

On April 10, 2017, claimant was evaluated by Joseph Chen, M.D., at the UIHC. Claimant indicated some improvement in symptoms. He indicated he wanted to return to physical therapy. Claimant was prescribed physical therapy. (JE8, pp. 81-84)

In an August 20, 2017 letter, Dr. Foster indicated he had reviewed claimant's medical records. Dr. Foster indicated claimant had a longstanding lumbar degenerative disc disease, particularly at the L4-S1 levels. Dr. Foster reviewed claimant's job requirements and job description. Dr. Foster found no evidence from claimant's history, exam or studies that claimant's condition was a result of cumulative trauma from his employment. He opined evidence-based medicine and clinical data refuted the idea of cumulative trauma to the spine. (Ex. A)

In a November 3, 2017 letter, written by defendants' counsel, Dr. Chen indicated he reviewed claimant's job description and medical records. He opined claimant had a longstanding degenerative disc disease. He found no evidence in claimant's history, exam or studies, or review of the medical records claimant's degenerative lumbar condition was the result of cumulative trauma. (Ex. B)

In a March 29, 2018 report, Sunil Bansal, M.D., gave his opinions of claimant's medical condition following an independent medical evaluation (IME). Claimant indicated he had a lower back strain in January of 2016 that resolved. Claimant indicated lifting, climbing and bending caused his left leg pain. He had constant back pain and pain in both legs. (Ex. 1, pp. 13-14)

Claimant said he had to lift 100 pound hoses and generators. Claimant used hand tools like grinders and manual sanding of pipes. Claimant lifted buckets of paint weighing 40 pounds. He carried a tool bucket weighing 30 pounds. (Ex. 1, pp. 15-16)

Dr. Bansal opined that claimant's work at Brand was a substantial factor in permanently aggravating a preexisting lumbar spine disease. He opined the aggravation was permanent. He opined that claimant's heavy lifting, climbing and

bending led to the permanent aggravation of claimant's lumbar condition. (Ex. 1, pp. 17-18)

Dr. Bansal opined that claimant had reached maximum medical improvement (MMI) as of March 23, 2017. He opined that claimant had a 14 percent permanent impairment to the body as a whole as a result of his lumbar injury. Dr. Bansal limited claimant to no lifting over 20 pounds occasionally and no frequent bending, climbing or twisting. (Ex. 1, pp. 20-21)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant is entitled to have his case reheard. Claimant contends his case should be reheard by a deputy workers' compensation commissioner, not including Deputy Workers' Compensation Commissioners Erica Fitch, Stephanie Copley or James Christenson. Claimant also contends that Workers' Compensation Commissioner Joseph Cortese should be "barred" from issuing a new ruling or decision regarding this case. Claimant also contends that it was error to delegate this case to a deputy other than Deputy Workers' Compensation Commissioner Fitch, that the rehearing decision was inadequate and that claimant's demeanor was a substantial factor in this case.

Iowa Code section 17A.15(2),indicates, in relevant part:

> When the agency did not preside at the reception of the evidence in a contested case, the presiding officer shall make a proposed decision. Findings of fact shall be prepared by the officer presiding at the reception of the evidence in a contested case unless the officer becomes unavailable to the agency. If the officer is unavailable, the findings of fact may be prepared by another person qualified to be a presiding officer who has read the record, unless demeanor of witnesses is a substantial factor. If demeanor is a substantial factor and the presiding officer is unavailable, the portions of the hearing involving demeanor shall be heard again or the case shall be dismissed.

As detailed above, and in other rulings in this case, Deputy Workers' Compensation Commissioner Fitch heard this matter on May 15, 2018. Deputy Fitch was taken off of all regular duties, including hearings, to work full time on the development and implementation of the WCES. Deputy Fitch was unavailable under Iowa Code section 17A.15(2).

On July 9, 2019, due to Deputy Fitch's unavailability, Deputy Commissioner Copley was appointed to make the findings of fact and a proposed decision in this case.

Claimant did not object to that delegation. Claimant did not file a petition for judicial review under Iowa Code section 86.26(1) or move for interlocutory appeal.

On July 19, 2019, an arbitration decision was issued by Deputy Copley. That decision found, in part, that claimant failed to carry his burden of proof he sustained a work-related injury.

Claimant did not object, upon issuance of the decision, to the delegation of authority. Claimant did not file a petition for judicial review under Iowa Code section 86.26(2) or an interlocutory appeal regarding the delegation.

On October 15, 2019, claimant filed his appeal brief. Approximately 100 days after the delegation of authority was issued, claimant, for the first time, argued that the delegation was improper and that claimant's demeanor was a substantial issue in this case.

Claimant waived his opportunity to raise either issue. However, in an effort to maintain the integrity of the contested case proceeding, the agency granted claimant an opportunity to have a second "demeanor" hearing as detailed under Iowa Code section 17A.15(2).

At the request of claimant, a hearing assignment order was issued on May 28, 2020 for a demeanor hearing to be held on August 5, 2020.

Claimant requested the demeanor hearing. Claimant did not object to the demeanor hearing. Claimant did not argue that the demeanor hearing was an inadequate remedy. It was not until claimant filed his brief, on November 25, 2020, over 100 days after claimant first agreed to the hearing on demeanor, that claimant argued that the demeanor hearing was an inadequate remedy.

Claimant requested the demeanor hearing. Claimant did not object to the demeanor hearing. Claimant did not argue, at the August 5, 2020 hearing, that the demeanor hearing was an inadequate remedy. Given this record, it is found that claimant has waived this argument and is therefore precluded from now arguing that the August 5, 2020 demeanor hearing was an inadequate remedy.

As noted, Deputy Commissioner Fitch heard this matter on May 15, 2018. Following the hearing, Deputy Fitch was taken off of her regular duties and was assigned to work full time in developing and implementing the WCES. Deputy Fitch was unavailable, as that term is intended under Iowa Code section 17A.15(2).

There is no evidence Deputy Fitch was available to issue an arbitration decision in this case. Delegation of a deputy commissioner to issue a decision in a contested case heard by another deputy, under Iowa Code section 17A.15(2), is a normal procedure before this agency. If claimant is allowed to limit the commissioner's authority to delegate under 17A.15(2), this would significantly hinder this agency's ability to render rulings, arbitration decisions and appeal decisions and to conduct the duties of this agency.

In the original underlying arbitration hearing, claimant did not argue the demeanor was a substantial factor. It was not until 100 days after the delegation was made that claimant raised this issue. Claimant failed to file a motion for interlocutory appeal or petition for judicial review regarding the delegation decision.

Claimant waived the issue that demeanor was a substantial issue in the original hearing. However, this agency allowed claimant to have a second demeanor hearing, as detailed under Iowa Code section 17A.15(2). Following the second hearing, a decision was issued finding that demeanor was not a substantial factor in this case. Claimant again argues, without any evidence, that demeanor is a substantial factor in this case and that he should be granted a third hearing.

Delegation was proper under Iowa Code section 17A.15(2) in this case. Claimant initially waived the issue that demeanor was a substantial factor in this case. Demeanor has been found not to be a substantial factor in the underlying hearing. Claimant has failed to show how his case has been prejudiced, in light of the fact that he has already had two hearings for one claim. Given this record, and the other facts as detailed above, claimant's request for a third hearing is denied.

The next issue to be determined is whether claimant carried his burden of proof that he sustained an injury that arose out of and in the course of employment.

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 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable

rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant contends his lifting, painting, crawling, bending and climbing in his work at Brand permanently aggravated a preexisting back condition. (Claimant's Post-Hearing Brief, pp. 5-6)

As detailed above, claimant initially treated at the emergency room at Fort Madison Community Hospital on July 19, 2016 for leg pain. Records from this visit make no mention of claimant's employment or work duties as a cause for his leg pain. (JE1, pp. 1-3)

Claimant saw a chiropractor in August 2016 for treatment. The chiropractic records make no mention that claimant's employment or work duties were the cause of his leg or back problems. (JE2, pp. 7-9)

Claimant treated with Dr. Juhl for leg pain. Dr. Juhl's records make no mention of claimant's employment or work duties as a causal factor. Records from Dr. Juhl do mention that claimant's leg pain "just developed" and that claimant woke up one morning with leg pain. (JE3, p. 13)

After termination from Brand, claimant treated at Great River Orthopedic Specialists at the UIHC. Claimant had two back surgeries with Dr. Foster. There is no mention in any of these records that claimant's employment or job duties were the cause of his back or leg condition. (JE5; JE8)

Claimant testified at hearing he began having leg pain on July 19, 2016. (Tr. p. 26; JE1, pp. 1-3) In deposition, claimant said his leg pain developed the day after work. (Ex. H, p. 6) Records from Dr. Juhl indicated that claimant woke up one day with leg pain. (JE3, p. 13)

In November 2016, claimant told Dr. Merritt he developed lower back pain in January 2016. (JE5, p. 23)

A physical therapy note from January 2017 indicates claimant began having back pain in January of 2016 and later, left leg pain in February of 2016. (JE1, p. 4)

Three experts opined regarding the cause of claimant's low back and leg condition. Dr. Foster treated claimant for an extended period of time. Dr. Foster performed two surgeries on claimant's lower back. Dr. Foster found no evidence that claimant's condition was the result of his employment with Brand. (Ex. A)

Dr. Chen treated claimant at UIHC. He opined that claimant's back condition was not the result of a cumulative trauma from his work with Brand. (Ex. B)

Dr. Bansal evaluated claimant once for an IME. Dr. Bansal opined that claimant's work at Brand permanently aggravated a preexisting lumbar spine disease. (Ex. 1, pp. 7-18) Dr. Bansal's opinions regarding causation are problematic for several reasons. As noted, Dr. Bansal's report is the sole opinion linking claimant's job at Brand to permanent aggravation of a preexisting low back condition. As detailed above, there is no mention of claimant's job or work duties as a potential cause of his back or leg problems in any treatment records. Dr. Bansal offers no rationale and no analysis for this discrepancy between his opinion and the treatment records.

As detailed, claimant's testimony of the onset of his lower back and leg pain is inconsistent. Records from Dr. Juhl indicate that claimant woke up with leg pain. At least two records indicate the claimant began having back pain in January of 2016.

(JE3, p. 13; JE1, p. 4; JE5, 23) Dr. Bansal offers no analysis or rationale for this discrepancy.

Dr. Bansal's opinions regarding causation are based, in part, on his understanding of claimant's job duties and lifting requirements at Brand. Dr. Bansal's report indicated that claimant worked with 100 pound hoses and lifted 100 pound generators. (Ex. 1, p. 15)

In deposition, claimant testified that the most he lifted at work was 45 pounds. (Ex. H, p. 4; Deposition, p. 10)

Dr. Bansal's opinion regarding causation indicated that claimant was lifting 40 pound buckets of paint and carrying a 30-pound tool bucket. (Ex. 1, p. 18) Claimant testified he carried smaller buckets of paint, not the 40 pound ones. He also testified that his tool bucket weighed between 10 to 15 pounds. (Tr., pp. 56-57)

Dr. Bansal offers no rationale why there is no mention in any of the treatment records that claimant's job was a factor in his low back and leg condition. He offers no explanation for discrepancies in the onset of injury. Dr. Bansal's understanding of claimant's lifting requirements for Brand is substantially different from that which claimant testified at hearing. Based on these numerous problems with Dr. Bansal's opinion, it is found that his opinion regarding causation is found not convincing.

The treatment records make no mention that claimant's job duties at Brand were a potential cause of his back or leg condition. Claimant's report of the onset of symptoms is inconsistent. Dr. Foster and Dr. Chen both opined that claimant's job at Brand did not cause or aggravate claimant's preexisting back condition. Dr. Bansal's opinion regarding causation is found not convincing. Given this record, claimant has failed to carry his burden of proof that he sustained an injury that arose out of and in the course of employment on October 25, 2016.

As claimant failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment, all other issues are moot.

Regarding the rehearing decision concerning demeanor, I affirm Deputy Commissioner Copley's findings that claimant's testimony in the rehearing did not impact or change the findings of fact, or conclusions of law, found in the arbitration decision.

ORDER

IT IS THEREFORE ORDERED:

That the arbitration decision filed on July 19, 2019, and the rehearing decision regarding demeanor filed on August 7, 2020, are affirmed in their entirety.

Claimant shall take nothing from these proceedings.

Both parties shall pay their own costs and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 21st day of January, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas M. Wertz (via WCES)

Jean Z. Dickson (via WCES)