BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONNIE TREMBLY, Claimant, vs. HY-VEE, INC., Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAY 8 2018 WORKERS' COMPENSATION File No. 5053539 APPEAL DECISION Head Note No: 1100; 1801

Defendants Hy-Vee, Inc., employer, and its insurer, EMCASCO Insurance Co., appeal from an arbitration decision filed on January 5, 2017. Claimant Ronnie Trembly responds to the appeal. The case was heard on August 24, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 12, 2016.

The deputy commissioner found claimant carried his burden of proof that he sustained an injury which arose out of and in the course of his employment with defendant-employer on or about April 6, 2015. The deputy commissioner found claimant and his witnesses were credible. The deputy commissioner found claimant is entitled to receive temporary total disability (TTD) benefits from May 21, 2015, through September 5, 2015. The deputy commissioner found claimant's average gross weekly wage for the work injury was $1,168.69, and the deputy commissioner found claimant's weekly benefit rate for the injury, classification married with two exemptions, is $728.66. The deputy commissioner found claimant is entitled to payment by defendants for the past medical expenses itemized in Exhibits 1 through 10. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that he sustained a work-related injury on or about April 6, 2015. Defendants assert the deputy commissioner erred in finding claimant and his witnesses were credible. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive TTD benefits from May 21, 2015, through September 5, 2015. Defendants assert the deputy commissioner erred in finding

claimant is entitled to payment by defendants for the past medical expenses itemized in Exhibits 1 through 10. Defendants assert deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on January 5, 2017, which relate to the issues properly raised on intra-agency appeal.

I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to the issues raised in the arbitration proceeding. I affirm the deputy commissioner's finding that claimant carried his burden of proof that he sustained a work-related injury on or about April 6, 2015. I affirm the deputy commissioner's finding that claimant and his witnesses were credible. I affirm the deputy commissioner's finding that claimant is entitled to receive TTD benefits from May 21, 2015, through September 5, 2015. I affirm the deputy commissioner's finding that claimant's average gross weekly wage for the work injury was $1,168.69, and I affirm the deputy commissioner's finding that claimant's weekly benefit rate for the injury is $728.66. I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants for the past medical expenses itemized in Exhibits 1 through 10. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues and I provide the following additional analysis for my decision:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant's left arm was severely injured in a motor vehicle accident which occurred in June 2012. (Hearing Transcript, p. 12) The June 2012 incident was in no way connected with claimant's employment with defendant-employer. As a result of that injury, claimant was diagnosed with compartmental syndrome. (Id.)

Conservative treatment, including medication, failed. (Tr. pp. 12-13) To alleviate claimant's pain, John Gachiani, M.D, of Mercy Neurosurgery, implanted a spinal cord stimulator (SCS) on May 20, 2014. (Exhibit B, p. 1) The SCS is a device fused to claimant's cervical spine, with wire leads connected to a remote-control receiver implanted in claimant's low back. (Tr. p. 13) A hand-held programmed remote-control can be used to adjust the stimulation up or down based on the level of pain experienced

at any given time. The SCS is the only treatment which relieved claimant's pain resulting from the June 2012 incident to the point where he could return to work (Tr. p. 13) Claimant was instructed by Dr. Gachiani and Andy Marriott, the representative from the company that makes the SCS, to learn new limitations and to be careful not to fall down. (Tr. pp. 21-22)

After the SCS was implanted and programmed, claimant's pain was relieved to the extent he was able to apply for a position as an over-the-road truck driver for defendant-employer. Claimant was hired on September 25, 2014. (Tr. pp. 12-13) Claimant would bid for routes each day. Because he had little seniority, he did not drive the same route every day. (Tr. p. 41)

On or about April 6, 2015, claimant picked up a load from defendant-employer's warehouse in Chariton, Iowa, and drove to Waterloo Hy-Vee Store #2 to deliver the load. (Tr. pp. 15-16) He arrived by 6:00 a.m. (Tr. p. 16)

Upon arrival, claimant waited for a truck that arrived before him to leave. After the other truck left, claimant backed his truck into a dock and entered the store to use the restroom (Tr. pp. 16-17)

Claimant testified that as he returned from the restroom he spoke to an individual who was walking past him. As that individual walked past him, claimant turned to talk to him. As claimant turned, his left foot stepped on an empty four-roller bread rack, which caused him to fall onto his left side and left elbow. (Tr. pp. 17-18) As claimant fell, his head snapped hard toward his left and his cap and his glasses were knocked off. (Tr. pp. 18-19) Upon getting up, claimant put his cap and his glasses back on and he resumed working. (Tr. p. 18)

When claimant went back out to his truck, he got the remote-control for his SCS and he brought it back into the store with him. He raised the stimulation level from eight to ten due to increased pain in his left arm. (Tr. p. 19)

Claimant mentioned the incident to an individual at the store who claimant believed to be the back room manager. (Tr. p. 44) However, because claimant's pain was sufficiently controlled with the adjustment of the SCS, he did not believe he had been significantly hurt, so he did not fill out an injury report or call the injury in to dispatch, (Tr. pp.48-49)

After the incident occurred, claimant did not immediately seek medical attention because the SCS continued to work for about three days and it successfully controlled his pain. The SCS then stopped functioning. (Tr. pp. 22-23) Claimant notified the SCS provider that the device had quit. Clamant spoke with Andy Marriott, the representative for the SCS company, four days after the fall and told Mr. Marriott about the fall. (Tr. pp. 24; 60-61) Renae Martin, a senior claims adjustor with defendant-insurer, testified at hearing that Mr. Marriott confirmed to her that claimant told Mr. Marriott that claimant had fallen. (Tr. pp. 93; 96) Claimant testified that the fall at defendant-employer's

Waterloo store, which occurred on or about April 6, 2015, was the only fall he had experienced in the last two years (Tr. p. 25), which means it was the only fall claimant experienced after the SCS was implanted.

Claimant testified Mr. Marriott concluded the fall probably snapped claimant' neck hard enough to damage some of the SCS stimulator leads. Claimant stated Mr. Marriott expressed concern there could be a "cascading effect" on the remaining leads which would eventually cause them all to stop working. (Tr. pp. 24-25)

Mr. Marriott reprogrammed the SCS two weeks later, on approximately April 24, 2015. (Tr. p. 25) During the two and a half weeks without the SCS before it was reprogrammed, claimant experienced a gradual increase in pain, which was "most definitely" worsening. (Tr. p. 26) Claimant continued working after the SCS was reprogrammed. (Tr. p. 26) However, the SCS stopped working altogether three days after it was reprogrammed. (Id.) When claimant notified Mr. Marriott that the SCS was no longer functioning, it was decided claimant would return to Dr. Gachiani to see about having it replaced. (Tr. p. 27)

After the SCS completely stopped working, claimant sought medical treatment from Dr. Christy Manganello at the Lucas County Health Center. Claimant was not able to see Dr. Manganello until May 22, 2015. In her clinical note for that evaluation, Dr. Manganello noted the following, in pertinent part:

> . . . evaluation of left forearm pain that started after he tripped and fell. He got his foot caught on a rolling table and he went down on his left elbox [sic] and he said that when he hit his neck was jared [sic] left. This happened about 6 weeks ago and the symptoms started 3 weeks [sic]. The symptoms began on 04/14/15, are moderate to severe in severity and started after spinal stimulator device stopped working. This was not a work comp injury. The symptoms are worsened by activity. The symptoms are relieved by nothing tried thus far.

(Ex. 13, p. 56)

When asked at hearing if he knew why Dr. Manganello's May 22, 2015, clinical note stated this was not a workers' compensation injury, claimant testified he did not know why. (Tr. p. 33) It is noted that Dr. Manganello's note does not specifically state claimant actually told her this was not a work-related injury, or that claimant actually told the doctor he was injured at some location other than defendant-employer's Waterloo store. Defendants had the opportunity to depose Dr. Manganello to find out from her what claimant told her about whether claimant actually sustained a work-related injury, but defendants did not take her deposition. Because the second sentence of the above-quoted text states "He got his foot caught on a rolling table and he went down . . ." which is consistent with all of claimant's other descriptions of how the incident occurred at defendant-employer's Waterloo Store, I therefore find Dr. Manganello's May 22, 2015, clinical note does not establish claimant told Dr. Manganello the incident was not

a work-related injury and it does not establish claimant told Dr. Manganello he was injured at some location other than defendant-employer's Waterloo store.

At the May 22, 2015, evaluation, Dr. Manganello prescribed hydrocodone for claimant to take until he could have the surgery to replace the SCS. (Tr. pp. 31-32) Federal rules mandate that anyone on prescription pain medications, including hydrocodone, may not drive a semi-truck (Tr. p. 31) Claimant has tried other pain medications which would have allowed him to drive, but without the SCS, those medications do not give him the pain relief necessary for him to drive a truck. (Tr. p. 32)

Claimant testified that after Dr. Manganello's May 22, 2015, evaluation, he had a discussion with defendant-employer's management personnel, Jim Moore and Jamie Aulwes, regarding his injury and his need for pain medications and surgery. (Tr. pp. 32-33) It was determined claimant would need to be off work while he was on hydrocodone and waiting for the SCS to be replaced. (Tr. p. 32)

Claimant saw Dr. Gachiani on May 26 and again on July 9, 2015. (Ex. 12, pp. 33-34) On July 9, 2015, Dr. Gachiani noted, in pertinent part: "Since patient was undergoing significant relief with the SCS plan is to revise it." (Ex. 12, p. 36)

Dr. Gachiani performed the surgery to replace the SCS on August 4, 2015. (Ex. 12, p. 45) Dr. Gachiani kept claimant off work from August 4, 2015, through September 3, 2015. (Ex. 12, p. 47) This was because even though the SCS had been replaced, the replacement device would not function until it was programmed following a period of recovery after the surgery. (Tr. p, 36)

On December 22, 2015, Dr. Gachiani signed an opinion letter drafted by claimant's attorney. (Ex. 12, pp. 48-49) By signing the opinion letter, Dr. Gachiani indicated he believes falls are a common cause of broken spinal cord stimulators. Dr. Gachiani also indicated that based upon a history of a fall and problems with the device, it's medically more probable than not that the fall sustained by claimant was the cause of the failure of the SCS which was surgically replaced. (Ex. 12, p. 48)

Claimant was able to return to work on September 4, 2015. (Tr. p. 38) He continues to work as a truck driver for defendant-employer. (Tr. p. 104) Mr. Aulwes, who was Director of HR in April, 2015, when claimant was injured, and who was the Director of Grocery and HBC warehouse in Chariton at the time of the hearing, testified that claimant is considered a good worker. (Tr. p. 106) Claimant does not allege he sustained and permanent disability as a result of the April 6, 2015, work injury.

In addition to claimant, two other witnesses testified on claimant's behalf, stating claimant told them about the fall at defendant-employer's Waterloo store. Claimant's wife, Kim Trembly, testified that in the first part of April 2015, claimant came home and told her he had fallen "on a bread rack thing. He was walking and talking, and he got – and he stepped on that, and it took off." (Tr. p. 76) Claimant told his wife the fall occurred at defendant-employer's store in Waterloo. (Tr. p. 76)

Claimant's co-worker, Rodney Allen, provided a written statement signed and dated January 2, 2016, in which he stated, "I remember Ron told me that he fell up at the Hy-Vee Store #2 in Waterloo. I am not sure of the exact date, but it was some time in the spring of 2015." (Ex. J, p. 1) Mr. Allen testified at hearing that claimant called him on the telephone as claimant was leaving the store the day the fall occurred. (Tr. p. 66) Mr. Allen stated claimant told him he had fallen down on a bread rack, hitting his left elbow and knocking his glasses off. (Tr. p. 66) Mr. Allen stated the telephone call was in the spring of 2015, somewhere around the first of April and the fall was at defendant-employer's store in Waterloo. (Tr. p. 66)

Claimant's wife and Mr. Allen both testified claimant discussed the injury with them shortly after it occurred. Their testimony is relevant to establish claimant spoke from the very beginning about the fall as occurring sometime in early April 2015, at defendant-employer's Waterloo store. Despite the assertions of defendants to the contrary, I find any inconsistencies in their testimony are very minor and insignificant and do not raise any questions about the truthfulness of their testimony or the truthfulness of claimant's testimony.

It is most significant that Renee Martin, a senior claims adjustor with defendant-insurer, testified at hearing that Mr. Marriott, the representative with the SCS company, confirmed to her that claimant told Mr. Marriott that claimant had fallen. Ms. Martin's testimony regarding what Mr. Marriott told her corroborates the testimony of claimant's wife and Mr. Allen. I therefore affirm the deputy commissioner's finding find that claimant's wife and Mr. Allen were credible witnesses.

Defendants assert claimant's statements about how the incident occurred have changed over time and should be viewed as contradictory and lacking credibility.

A workers' compensation employee report filled out on May 29, 2015, is marked as Exhibit D. A careful look at the handwriting on Exhibit D clearly indicates it was filled out and dated by someone other than claimant and then it was signed by claimant. In Exhibit D, it states, "I tripped over a bread rack." (Ex. D, p.1)

Claimant's recorded statement (Ex. E) was taken by Renee Martin on May 29, 2015. (Tr. p. 84) In his recorded statement, claimant stated:

> . . . There was a bread rack sitting in the aisle, empty with no bread racks on it and I got tangled up in it and fell to the floor on my left side. Hit my left elbow . . .and I just tripped over it. Just got tangled up in it, didn't see it . . .

(Ex. E, p. 7)

During his deposition, claimant testified as follows:

> Q. So tell me the sequence of events. You arrive at the store, you back into the dock and then what happens?

A. I walked in the back room and walked through the double doors into the store to go to the restroom.

Q. Okay.

A. As I was coming out of the restroom, I met the milkman. At the same time, the backroom manager came in the general area.

Q. All right. And did you have conversation with any of them?

A. I did.

Q. Okay. What was the conversation about?

A. Basically joking, asking the milkman to get out of the way.

Q. Okay. And did - -

A. He was getting out of the way, and I was going to get in my truck to back into the dock.

Q. Okay.

A. And I was looking over my left shoulder, talking to him walking away from me and stepped on a bread rack that was laying there.

Q. And tell me what a bread rack looks like.

A. It's a square piece of angle iron with four wheels on it that the bread rack sits in.

Q. And how far off the ground is this item?

A. 6 inches.

Q. Okay. And no racks actually going up?

A. No.

Q. It's just there and, what, like the square plastic things that bread comes on fits into those?

A. Yes.

Q. And then you can stack those plastic things up?

A. Yes.

Q. But there were no plastic things on that particular rack?

A. No.

Q. Okay. And then did you fall to the ground? Did it slide your feet out from under you? How did that work?

A. I got tangled up in it with my right foot and couldn't regain - - I couldn't regain my balance, and I just fell to the left.

Q. Okay. And did they come to your assistance after you fell?

A. No. There was nobody around. The one guy went wherever he was going; and the other, the milkman, I assume was in the restroom.

Q. Okay. So you had had some conversation with them before the incident occurred. Then they left the area, and that's when you had your fall?

A. Yes.

Q. And describe for me how you fell. Which direction did you fall?

A. I fell on my left elbow and shoulder.

(Ex. G, p.12, depo pp. 42-45)

At hearing, claimant testified as follows:

. . . As he walked past me, I was turned to talk to him. As I turned back around towards the double doors, my left foot stepped on a bread rack, which is a four-roller bread rack, which was empty, and it went out from underneath me, and I fell on my left side and left elbow, and my hat and my glasses and everything flew off onto the floor . . .

(Tr. p. 18)

Defendants assert the above and foregoing establishes that claimant made contradictory statements about what occurred when he allegedly was injured. I find the above and forgoing simply documents claimant said essentially the same thing in the incident report, in his recorded statement, in his deposition testimony, and in his hearing testimony, but he said it in slightly different ways which are not contradictory and which do not have the effect of calling his credibility into question.

As defendants point out, claimant has said different things at different times regarding who was present in the area right before and right after he fell.

In Exhibit D, the workers' compensation employee report, where it asks who witnessed the accident, the written response states:

> A gentleman that runs the backroom of Waterloo #2 Hy-Vee Store. His name is Bill. (I believe)

(Ex. D, p.1)

When Renae Martin took claimant's recorded statement on May 29, 2015, the following exchange took place:

Renae: Okay and can you describe in detail what happened?

Ronnie: Um I was walking. The gentleman for the back room was walking away from me opposite direction. I turned around to look at him and tell me that the load was there and turned back around or was turning back around to go back towards the dock. There was a bread rack sitting in the aisle, empty with no bread racks on it and I got tangled up in it and fell to the floor on my left side. Hit my left elbow.

. . .

Renae: Um the gentleman you said you were walking by, who was that?

Ronnie: I believe his name is Bill. I've tried to get his name.

Renae: Does he work at the Waterloo store?

Ronnie: Yes he's like the night, like a night stockman or something. He's about always there but it's in the a.m. morning when we're unloading.

Renae: Okay.

Ronnie: He's an older gentleman.

Renae: So he saw you do this?

Ronnie: Well I don't know whether he seen me do it or not. I know I just talked to him prior to that . . .

(Ex. E, pp. 7-8)

At the time of his deposition, claimant described two people as being present in the general area around the time he fell, "a backyard-backroom person" and "a milk delivery person." (Ex. G, p. 11, depo p. 40) Claimant stated he was talking to the "milkman" immediately prior to his fall. (Ex. G, p. 12, depo p. 43) At the hearing,

claimant testified he did not know who he was talking to immediately prior to the accident. (Tr. P. 18) While claimant's testimony on this point is somewhat confused, I find it does not call claimant's credibility into question because this particular point is not as important as claimant's testimony as to how the accident actually happened, which I found above that claimant's testimony, and the testimony of his witnesses, as to how the accident happened, and that it happened while he was working, is consistent throughout this matter and it has not been contradictory.

Defendants also assert claimant's inquiry about making a short-term disability claim (Tr. pp. 110-112) before he made a workers' compensation claim calls into question whether the injury occurred as claimant alleges. However, I find in this case that claimant's inquiry about a possible short-term disability claim does not establish claimant's injury did not occur as alleged because there is no evidence in the record that when claimant made the inquiry he indicated the injury in question occurred outside of the workplace. In fact, Shelli Byers, who testified at hearing regarding claimant's inquiry, stated that when claimant made the inquiry, he did not say how he was injured and he was not asked how he was injured. (Tr. pp. 112-113) There is no evidence in the record as to why claimant inquired about short-term disability benefits, only that he inquired as to whether such benefits were available to him. Without more information on this particular point, I find the fact that claimant did inquire about short-term disability benefits is not relevant to the question of whether claimant's injury arose out of and in the course of his employment.

Defendants also take issue with the fact that claimant did not report the injury to defendants immediately. Claimant did not report the fall to defendants until late May 2015 (Ex. D) Claimant testified he did not report the injury when it occurred because he did not believe he was seriously injured and because the SCS controlled his pain for a time until it stopped working. (Tr. pp. 19-20, 43-44, 48-49) After claimant learned he would need to have the SCS replaced and would have to miss work, he reported the injury. (Tr. pp. 32-33) The damage to the SCS was not a typical workers' compensation injury and it is reasonable to conclude claimant waited to report the injury until he finally understood the serious repercussions of the injury.

Defendants assert that because claimant cannot pinpoint the date upon which the injury occurred, claimant failed to carry his burden of proof that the injury arose out of and in the course of his employment. Claimant has been consistent throughout this matter that while he cannot pinpoint the date of injury, he knows the injury occurred sometime in early April 2015. (Ex. G, p. 11; depo pp. 39-40; Tr. pp. 15, 43) There may not have been any dispute in this case as to whether claimant's injury occurred as he alleges, and when it actually occurred, if defendants had preserved store security videos which might have answered those questions.

When Renae Martin took claimant's recorded statement on May 29, 2015, after claimant first reported the injury, the following exchange took place regarding the injury date:

Renae: Okay and then can you give me the approximate day and time that your injury occurred?

Ronnie: Um it was approximately on April 4th somewhere around 5 to 5:30 a.m.

(Ex. E, p. 6)

Ms. Martin stated that after she took claimant's statement, she got in touch with her contact person for defendant-employer to obtain more information about the claim. (Tr. p. 86) Ms. Martin stated store security videos for April 4, 2015, were reviewed and those videos showed claimant in the store, but they did not show claimant falling down. (Tr. pp. 89-90) Ms. Martin testified she did not review those videos herself. (Tr. pp. 88-89) Ms. Martin stated claimant was advised that the videos for April 4, 2015, did not show the accident happening, so claimant then provided four additional dates when the accident could have happened. (Tr. p. 92) Ms. Martin then testified as follows:

Q. Okay. And we talked about this a little bit earlier, but you don't have any security footage from the Waterloo No. 2 store, is that correct?

A. Correct.

Q. And that includes a multitude of dates that you were provided by Mr. Trembly?

A. Correct.

Q. And do you know why you don't have it?

A. Yeah, because Hy-Vee, their footage gets taped over after, like, 30 to 45 days. I'm not exactly sure of the time period, but they don't keep their video for any length of time.

(Tr. pp. 93-94)

When claimant was deposed on December 16, 2015, he testified as follows:

Q. And when this injury occurred, you walked into the Waterloo store. Are we certain that the date is April 6 of 2015?

A. No, I'm not. No.

Q. And why is it that you're not certain of that?

A. When I - - When I fell, I didn't realize that I'd been hurt as seriously as it was.

(Ex. G, p. 11, depo pp. 39-40)

Claimant testified as follows at hearing:

Q. And from the records we have, on April 6 of 2015, did you pick a load up?

A. I did, yes.

Q. What was your route that day?

A. The Waterloo area.

Q. Okay. And you had a deposition taken in this case; correct?

A. Yes.

Q. And from memory you were unable to specifically dictate what date that occurred?

A. Yes.

Q. Okay. But after looking at the records, do you believe it to be April 6, 2015?

A. Yes.

(Tr. pp. 14-15)

Q. And then you told me at the time of your deposition that you weren't certain if your injury had occurred on April 6 of 2015?

A. Yes. I don't remember the exact date I was at that store.

Q. Okay. And today are you convinced that it's April 6?

A. No, I'm not still not sure of that exact date.

Q. So you can't tell me exactly what date. You think it might be close to April 6th?

A. Yes, close to.

(Tr. p. 43)

Q. We agree, don't we, Mr. Trembly, that you don't believe you fell on April 4th?

A. I don't know the exact date, no.

Q. Okay. So you can't say if it was April 4th or April 6th, April 7th, April 11th?

A. No.

Q. Would you say that it was March?

A. I would say it wasn't March. It was the first part of April.

(Tr. p. 115)

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 R. App. P. 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).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Under section 85.36, the gross weekly earnings of an employee who has worked for the employer for the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings over those 13 weeks, unless the wages do not fairly and accurately reflect the employee's customary earnings. See Griffin Pipe Products v. Guarinino, 663 N.W.2d 862 (Iowa 2003).

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above analysis, I affirm the deputy commissioner's finding that claimant was a credible witness. As stated earlier in this decision, I find claimant carried his burden of proof that he sustained an injury that arose out of and in the course of his employment with defendant-employer. Based on the testimony quoted immediately above, I find that while the date of injury cannot be pinpointed for certain, I find it is likely that the injury in question occurred on April 6, 2015. I therefore affirm the deputy commissioner's finding that claimant sustained a work-related injury on or about April 6, 2015.

Because I affirm the deputy commissioner's finding that claimant sustained an injury that arose out of and in the course of his employment with

defendant-employer on or about April 6, 2015, I affirm the deputy commissioner's other findings as follows:

I affirm the deputy commissioner's finding that claimant is entitled to receive TTD benefits from May 21, 2015, through September 5, 2015.

I affirm the deputy commissioner's finding that claimant's average gross weekly wage for the work injury was $1,168.69, and I affirm the deputy commissioner's finding that claimant's weekly benefit rate for the injury is $728.66.

I affirm the deputy commissioner's finding that claimant is entitled to payment by defendants for the past medical expenses itemized in Exhibits 1 through 10.

I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 5, 2017, is affirmed in its entirety.

Defendants shall pay claimant temporary total period benefits from May 21, 2015, through September 5, 2015, at the weekly rate of seven hundred twenty eight and 66/100 dollars ($728.66).

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay/reimburse claimant's medical expenses itemized in Exhibits 1 through 10.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 8th day of May, 2018.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Mark S. Pennington
Attorney at Law
5000 Westown Pkwy, Ste. 310
West Des Moines, IA 50266
mark@kphlawfirm.com

Anne L. Clark
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, IA 50312
aclark@hhlawpc.com