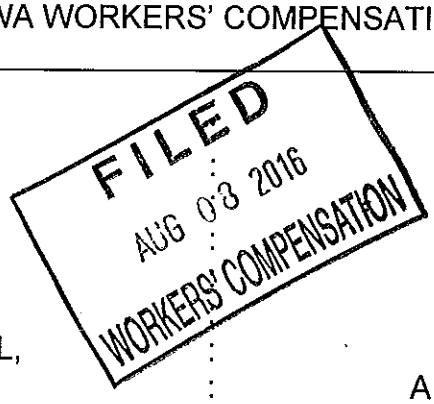
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JASON LEWIS, Claimant, vs. LEMARS DAILY SENTINEL, Employer, and BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5048668 ARBITRATION DECISION Head Note Nos.: 1402.30, 1403.30, 1802, 1803, 2501, 2907

STATEMENT OF THE CASE

Jason Lewis, claimant, filed a petition for arbitration against LeMars Daily Sentinel, the employer, and Berkshire Hathaway Homestate Insurance Company, the insurance carrier. An in-person hearing occurred on April 1, 2016 in Sioux City, Iowa.

The evidentiary record includes joint Exhibits 1 through 14. Defendants submitted a separate set of exhibits labeled as Exhibits A through C. All exhibits were received without objection.

Claimant was the only witness called to testify live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until May 13, 2016 to file and serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

STIPULATIONS

The parties submitted a hearing report at the commencement of the arbitration hearing. The undersigned accepted the hearing report, as well as counsel's recitation of all stipulations and disputes contained on that hearing report. However, for clarity sake, the parties have entered into the following stipulations:

1. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

2. The parties stipulate with respect to the claim for temporary total disability or healing period entitlement that "[a]lthough entitlement cannot be stipulated, claimant was off work during this period of time." (Hearing Report, p. 1)

3. With respect to the claim for permanent disability, the parties stipulate that "[i]f the injury is found to be a cause of permanent disability, ... the disability is an industrial disability." (Hearing Report, p. 1)

4. With respect to the claim for permanent disability, the parties stipulate that "[t]he commencement date for permanent partial disability benefits, if any are awarded, is the 21st day of October, 2015."

5. The parties have stipulated as to the applicable weekly rate that, "[a]t the time of the alleged injury, claimant's gross earnings were $593.60 per week." (Hearing Report, p. 1)

6. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was single." (Hearing Report, p. 1)

7. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was entitled to 1 exemptions (sic)." (Hearing Report, p. 1)

8. With respect to the claim for medical benefits, the parties stipulate with respect to the disputed medical expenses that "[a]lthough disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence." (Hearing Report, p. 2)

The undersigned accepted the parties' stipulations at the time of the arbitration hearing. (Transcript, pp. 5-7) However, to ensure clarity of the record, the undersigned now specifically accepts the parties' stipulations. The undersigned will not enter any findings of fact or conclusions of law pertaining to the parties' stipulations. The parties are expected to and ordered to comply with their own stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with LeMars Daily Sentinel on April 3, 2013.

2. Whether claimant gave timely notice of the alleged work injury.

3. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary total or healing period benefits.

4. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to industrial disability benefits.

5. Whether claimant is entitled to reimbursement, payment, or an order that defendants hold him harmless regarding any past medical expenses contained in Exhibits 9 and 11.

6. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

At the time of the arbitration hearing, Jason Lewis was a 45-year-old man. He is a high school graduate, but required special education assistance to complete his high school studies. Mr. Lewis attended Western Iowa Tech for one and one-half years. He was a credit short of obtaining a degree because he could not pass required math and English courses. (Claimant's testimony)

Mr. Lewis served in the National Guard, commencing his service his junior year of high school. However, he had bad knees and failed his re-enlistment physical. (Claimant's testimony)

During his work life, claimant has worked in a packaging position, in shipping and receiving, in the construction industry, as a farm hand, as a cable installer, and as a city employee for the City of LeMars in a seasonal position. Mr. Lewis started employment with the Daily Sentinel in LeMars in 2002 and worked his way into a full-time position with the company. He was hired as a press assistant, moved to a pre-press position, and was promoted to a production manager in early 2013. (Claimant's testimony)

In the early part of 2013, claimant was required to run the printing press, which required lifting paper rolls, sliding paper rolls, and catching papers off the press. He described those job duties as requiring him to lift paper roll shafts weighing 50-80 pounds as well as performing a great deal of bending and twisting. He would also have to roll large carts full of newspapers weighing up to several hundred pounds. (Claimant's testimony)

Claimant's job also required him to work longer shifts on Mondays and Tuesdays. On those days, he would work 10-12 hour days. (Claimant's testimony)

On April 3, 2013, only two people were present and working on the press. Claimant was loading paper and catching papers that day on the press. He had experienced some discomfort in his back in March 2013. However, on April 3, 2013, he

experienced an increase in his symptoms while catching papers off the press. He completed his shift on that date but experienced bad back spasms that night at home. (Claimant's testimony)

On April 4, 2013, claimant saw the production manager, Donny Luksan. Claimant testified that he had a conversation with the production manager, who asked him what was wrong. Claimant testified that he told Mr. Luksan that the job was the problem with all of the required bending and twisting. Mr. Luksan reportedly told claimant that if he could not do the job, he may need to find a new job. Despite this conversation, Mr. Luksan did not offer to complete any worker's compensation paperwork or a written report of injury. (Claimant's testimony)

A few days to a week later, claimant reported his symptoms and work injury to Monte Jost, also a member of management for the employer. Mr. Jost did not offer to complete any worker's compensation paperwork or a written report of injury. However, claimant's symptoms continued. (Claimant's testimony)

Therefore, claimant sought medical attention from his personal chiropractor, Michael Manley, D.C. He also sought evaluation at the LeMars Medical Clinic, where they took x-rays and provided him a prescription for muscle relaxers. Ultimately, Dr. Manley referred claimant for neurosurgical evaluation performed by Quentin J. Durward, M.D. on August 28, 2013. (Exhibit 1, page 1)

Claimant testified that he was experiencing low back pain and his leg was giving out by the time he was evaluated by Dr. Durward. Claimant had never experienced his leg giving way before April 2013. Dr. Durward ordered an MRI of claimant's lumbar spine. Dr. Durward initially believed that claimant's neck and thoracic symptoms were related to a prior motor vehicle accident occurring in 2011. (Ex. 1, p. 12)

Indeed, claimant was involved in a motor vehicle accident in February 2011. He was struck on the driver's side rear door by another driver at a high rate of speed. (Ex. A, p. 3) Claimant acknowledged that he experienced neck, shoulder and back pain after that motor vehicle accident and that he sought medical attention at the emergency room. (Claimant's testimony) Initial medical records disclose complaints of neck, upper back and shoulder complaints following the February 2011 motor vehicle accident. (Ex. A, pp. 3, 5) No complaints of low back symptoms or treatment are noted in the medical records immediately following the motor vehicle accident.

Claimant went to physical therapy following the motor vehicle accident and testified that the therapy was beneficial for his neck and back symptoms. His personal physician told him that his diagnostic films in 2011 did not demonstrate any spinal cord displacement, and claimant was never referred to a spine specialist following the motor vehicle accident. He missed one day of work following the February 2011 accident and was not aware of any permanent restrictions on his ability to work following that accident. He performed the full spectrum of his work duties with this employer between 2011 and April 3, 2013 despite the effects of the 2011 motor vehicle accident.

However, claimant did file a lawsuit and resolved that suit via settlement. (Claimant's testimony)

In 2013, Dr. Durward recommended an EMG as well as evaluation by a pain specialist. Claimant sought treatment with a pain specialist and received several injections in his back, both in the lumbar and thoracic regions following the 2013 increase in symptoms at work. Although the injections provided temporary relief or reduction of symptoms, the effects of the injections were not long-lasting. (Ex. 2, p. 21)

Per the instructions of Dr. Durward, claimant continued to work for the employer. However, by December 2014, claimant's thoracic symptoms were much worse. At that point in time, claimant was doing a lot more catching of papers and working a delivery route, which required claimant to push heavy bundles and carts onto trucks and lift large bags. (Claimant's testimony)

Dr. Durward thought it was necessary to obtain a repeat MRI of claimant's thoracic spine in December 2014. The repeat MRI demonstrated a thoracic disk herniation at T9-10. The herniation was left-sided and the MRI demonstrated significant changes since claimant's 2011 MRI. (Ex. 3) Following the MRI, Dr. Durward recommended surgical intervention for claimant's thoracic spine. (Ex. 1, pp. 27-28)

After reviewing the repeat thoracic MRI, Dr. Durward also revised his causation opinion and concluded that the changes in the MRI were causally related to claimant's work activities with the employer. In fact, after reviewing the MRI, Dr. Durward commented that he believed claimant had a fairly strong worker's compensation case. (Ex. 1, p. 23)

On June 11, 2015, Dr. Durward took claimant to surgery and performed a spinal fusion at the T9-10 level. (Ex. 1, pp. 29-30; Ex. 2, pp. 48-49) Claimant described the surgery as helpful. Claimant no longer trips but does still experience some pain down his legs. Claimant also noted he had some improvement in his low back but continues to experience low back problems. (Claimant's testimony)

Mr. Lewis was off work from June 6, 2015 through July 27, 2015 after his surgery. He did not receive wages or weekly worker's compensation benefits during this period of time. However, claimant acknowledges that he received $200.00 per week in short-term disability benefit payments during this period of time. (Claimant's testimony)

Dr. Durward declared claimant to be at maximum medical improvement and issued permanent restrictions on October 21, 2015. (Ex. 1, p. 52) Dr. Durward imposed restrictions that include no permanent lifting over 40 pounds on an occasional basis, no lifting over 25 pounds on a frequent basis, and only occasional bending or twisting at the waist. (Ex. 1, p. 44)

Nevertheless, claimant continues to treat with his pain specialist, Dustin S. Sorenson, M.D. Prior to hearing, claimant last sought treatment with Dr. Sorenson on March 16, 2016 and was scheduled to return to see Dr. Sorenson in May 2016. (Claimant's testimony)

After the imposition of permanent work restrictions, the employer offered claimant a position in the mailroom. Claimant declined that job offer and risked termination. Claimant testified that the mailroom position exceeded his permanent restrictions from Dr. Durward. Claimant introduced job posting advertisements from the employer demonstrating that the mailroom job claimant was offered required the ability to lift 50 pounds, which is beyond claimant's permanent lifting restrictions from Dr. Durward. (Claimant's testimony)

Claimant filed for unemployment and obtained a favorable decision after he declined the job offer. Once the unemployment decision was entered, the employer put claimant back to work packing plates and in the mailroom job but made sure he was able to stay within his permanent restrictions. Claimant continued to work full-time for the employer as of the date of the arbitration hearing. He testified that he likes his job and his co-workers. He has not attempted to search for alternate employment since the date of injury. (Claimant's testimony)

Mr. Lewis described himself as having amateur computer skills and that he is not proficient at keyboarding or using the computer. However, he has e-mail and receives job work orders from the employer via e-mail. He testified that he could not return to his prior positions with the employer. He also testified that he could not return to work as a cable installer, in his prior construction job or in his position unloading freight for Wal-Mart. Claimant is not sure what he would do for employment if he were laid off from his current job.

Claimant described ongoing leg weakness, particularly in the evenings. He described the sensation of leg weakness as occurring in his low back and running all the way down his legs into his feet. He continues to use prescription medications for anxiety, which also provide incidental pain relief.

The initial fighting issue is whether claimant sustained an injury as a result of his work activities on April 3, 2013. Claimant relies upon the medical opinion of Dr. Durward. Incidentally, it should also be noted that the pain specialist, Dr. Sorenson, noted that claimant's condition worsened after he changed job duties in April 2013. (Ex. 1, p. 1) Dr. Sorenson also opined in an office note dated June 5, 2014 that "He does have a work comp lawyer involved as this is most likely related to his injuries and he continues to pursue that." (Ex. 2, p. 36)

On the other hand, defendants rely upon the medical opinions of Douglas W. Martin, M.D. Dr. Martin performed an independent medical evaluation on claimant on March 27, 2015. It is clear that at the time of his initial evaluation, Dr. Martin had a less than complete medical record for claimant. (Ex. A, p. 24)

However, Dr. Martin took a history and evaluated. He concluded and opined:

> [W]e know quite well, based upon the evidence based literature that has been published on the subject, what causes this.... Degeneration of the spinal structures, such as the disks, have more to do with respect to a combination of genetics and anthropomorphic factors than anything else. As a matter of fact, the incidence of heavy physical work with regards to spinal problems has been extensively evaluated. The conclusion of this regarding an evidence based perspective is that heavy work, occupational postures, trunk flexion, bending or twisting do not have an association with the development of these degenerative types of processes.

(Ex. A, p. 31)

Dr. Martin subsequently reviewed additional medical records after the 2011 motor vehicle accident as well as additional medical records for treatment in 2013. Dr. Martin confirmed his prior diagnosis and causation opinions in a supplemental report dated June 25, 2015. In his supplemental report, Dr. Martin is quite critical of and delineates why he believes Dr. Durward's analysis of the causation issue is erroneous and not an evidence based analysis. (Ex. A, pp. 38-42)

Indeed, Dr. Martin provides an interesting and somewhat compelling explanation of evidence-based research regarding any causal connection between repetitive work activities and degenerative disc disease. However, claimant is not asserting that he had no pre-existing spinal degeneration. Rather, claimant urges that the work he performed caused an aggravation of the underlying condition. Dr. Martin's opinion does not squarely address that issue.

Instead, Dr. Durward explains:

> I do think that the worsening of his spine symptoms and MRI findings do relate to his work activities at the LeMars Sentinel Print Shop. I think it is reasonable to assume that the ongoing activities aggravated a pre-existing condition making it become symptomatic. I do think the motor vehicle accident may have caused some of the degenerative changes that he has in his thoracic spine or at least contributed in that, but the ongoing problems he has now I think relate to his work injury.

(Ex. 1, p. 51)

In this instance, I find the opinion of Dr. Durward (as supported by Dr. Sorenson's opinion) to be most convincing. Dr. Durward is the treating neurosurgeon. He evaluated claimant numerous times. He reviewed claimant's old MRI as well as the repeat MRI in 2015. Dr. Durward initially opined that claimant's thoracic spine condition was not related to his work activities. However, after observing the significant change in

claimant's spine via the repeat MRI in 2015, Dr. Durward changed his causation opinion.

I find Dr. Durward's opinions to be reasonable and thoughtful. I find them to be consistent with the development of increased symptoms described by claimant. I find them to be consistent with and a good explanation of why claimant sustained a significant change in his MRI that resulted in surgical intervention. Ultimately, I accept the opinions of Dr. Durward as most convincing and find that claimant has proven he sustained an aggravation of his underlying spinal conditions as a result of his cumulative and repetitive work activities as of April 3, 2013.

As of that date, claimant became acutely aware of a worsening of his condition as a result of work and as of that date felt the need to seek additional medical attention. Certainly, April 3, 2013 would be the absolute earliest that claimant knew of his condition, knew that it was work related, and could have even speculated that the new symptoms were permanent in nature.

Dr. Martin opines that claimant requires no permanent restrictions and qualifies for no permanent impairment because he did not sustain a work injury. However, having rejected Dr. Martin's causation opinion, I do not find his opinions pertaining to permanent impairment or permanent restrictions to be convincing. Instead, I accept Dr. Durward's permanent restrictions and his permanent impairment rating of 12 percent of the whole person as accurate.

Next, defendants raise a notice defense. Defendants contend that claimant did not give notice of his work injury within 90 days of its occurrence. Defendants offered no testimony or written evidence on this issue. Claimant testified that he told two members of management about his injury. Claimant's affirmative testimony was believable and is accepted as credible. I find that defendants had knowledge of the alleged work injury within 90 days of its occurrence.

I accepted the summary of expenses and payments outlined in Exhibits 9 and 11 as accurate. All medical expenses, payments made by a third party, and personal out-of-pocket expenditures outlined in Exhibits 9 and 11 are causally related to the work injury of April 3, 2013.

Given that claimant required surgical intervention, has injuries to his thoracic and lumbar spine, has sustained permanent impairment, requires permanent work restrictions, and has lost the ability to return to several of his former lines of work, I find that claimant has sustained a permanent loss of earning capacity as a result of the April 3, 2013 work injury. On the other hand, claimant continues to work full-time for the employer and still has residual earning capacity in the labor market as a whole. Considering claimant's age, educational background, employment history, ability to return to work in a new position, ability to retrain or find alternate employment, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that Mr. James has proven he sustained a

forty percent (40%) loss of future earning capacity as a result of the April 3, 2013 work injury.

CONCLUSIONS OF LAW

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).

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 which 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. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Having found the opinions of Dr. Durward to be the most convincing medical opinions in this record, I also found that claimant has proven that his work activities at the employer aggravated his thoracic and lumbar spine conditions. Therefore, I conclude that claimant has proven he sustained a cumulative injury that arose out of and in the course of his employment with this employer. Moreover, having found that April 3, 2013 was the earliest logical or possible date claimant could have recognized that he had an injury that was related to work and that it was serious, I conclude that April 3, 2013 is a proper injury date upon which worker's compensation benefits can be awarded.

Defendants raised a notice defense pursuant to Iowa Code section 85.23. 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 which 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. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendants presented no testimonial or written evidence to establish their asserted notice defense. Claimant specifically testified that he notified two individuals within the employer's management hierarchy within 90 days of the date of injury. Having found that claimant gave proper notice within 90 days to the employer, I conclude that the notice defense should fail. Claimant is entitled to benefits in some amount.

Mr. Lewis asserts a claim for healing period benefits from June 11, 2015 to July 27, 2015. 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.

Having found that Mr. Lewis was off work following surgery during the healing period claimed and having identified no other evidence that suggested claimant was capable of substantially similar work, and having found that claimant did not achieve maximum medical improvement until October 21, 2015, I conclude that claimant is entitled to an award of healing period benefits from June 11, 2015 to July 27, 2015. Iowa Code section 85.34(1).

Claimant also asserts a claim for permanent disability benefits. Claimant's injury involves his back. The parties appropriately stipulated that this injury, if found to be compensable, should be compensated on an industrial disability basis pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having found that claimant proved he sustained a 40 percent loss of future earning capacity as a result of the April 3, 2013 work injury, I conclude that claimant is entitled to a 40 percent industrial disability award, or 200 weeks of benefits. Iowa Code section 85.34(2)(u).

Mr. Lewis also seeks an order requiring defendants to reimburse all out-of-pocket medical expenses he has paid and an order requiring defendants to hold claimant harmless against any claims asserted by a third party that has paid medical expenses on behalf of claimant to date.

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).

Having found the medical expenses and out-of-pocket payments contained in Exhibits 9 and 11 to be accurate, reasonable and causally related to the work injury, I

conclude that defendants are obligated to reimburse claimant for all out-of-pocket expenses paid by claimant directly. I conclude that defendants are also obligated to hold claimant harmless and to reimburse, pay, or otherwise satisfy any outstanding medical expenses or medical liens asserted for payments made by a third party on behalf of claimant, as may be outlined in Exhibits 9 and 11.

Finally, claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period and temporary partial disability benefits from June 11, 2015 through July 27, 2015.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on October 21, 2015.

All healing period and permanent partial disability benefits shall be paid at the stipulated rate of three hundred seventy-eight and 66/100 dollars ($378.66) per week.

Defendants shall reimburse claimant for all out-of-pocket medical expenses paid directly by claimant and shall pay, satisfy, or reimburse any outstanding medical expenses or hold claimant harmless against any claims for liens or reimbursement made by a third party that has paid claimant's medical expenses, all as outlined and detailed in Exhibits 9 and 11.

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

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

Signed and filed this 8th day of August, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.