BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AARON CARPENTER, Claimant, vs. UNITED PARCEL SERVICES, INC., Employer, and LM INSURANCE CORPORATION, Insurance Carrier, Defendants.	File No. 20700589.01 ARBITRATION DECISION Head notes: 1100; 1403.30

STATEMENT OF THE CASE

Claimant, Aaron Carpenter, filed a petition in arbitration seeking workers' compensation benefits from defendants United Parcel Services, Inc., employer, and LM Insurance Corp., insurer. The hearing occurred before the undersigned on August 16, 2021, and September 9, 2021, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record consists of: Joint Exhibits 1 through 6; Claimant's Exhibits 1 through 8; and Defendants' Exhibits A through L. Claimant testified on his own behalf. Jamie Igou, Bill Vanderah, John Frederick, and Kevin Roberts also testified. The evidentiary record was closed at the conclusion of the September 9, 2021, hearing. The case was considered fully submitted upon receipt of the parties' briefs on November 5, 2021.

ISSUES

1. Whether Claimant sustained an injury, which arose out of and in the course of employment, on January 7, 2019;
2. Whether the case is barred due to Lack of Timely Notice under 85.23;

3. Whether Claimant is entitled to Healing Period benefits from January 8, 2019 to February 11, 2020;
4. Extent of Permanency Benefits;
5. Entitlement to Medical Benefits; and
6. Costs.

FINDINGS OF FACT

Claimant alleges he sustained a work-related injury to his low back on January 7, 2019. (Hearing Transcript, page 32; Exhibit A, Deposition Transcript, page 19)

On the morning of January 7, 2019, claimant contacted his supervisor, Kevin Roberts, prior to his shift and told him that he "would not be able to make it through the day," and he "needed to go to the doctor" due to the low back pain he was experiencing. (Ex. A, Depo. p. 22; see Hr. Tr., p. 88) Mr. Roberts responded by telling claimant he would have to work his shift as UPS did not have anyone that could cover it for him. (Ex. A, Depo. p. 22) Claimant told Mr. Roberts, "There's no way, again, I will not make it through the day." (Id.) In what appears to be a compromise, Mr. Roberts agreed to reduce the number of stops claimant was scheduled to make. (See Id.) Claimant told Mr. Roberts, "That isn't going to make a difference. I know I won't make it through the day." (Id.)

Despite his concerns, claimant reported to work for his normal shift at 9:00 a.m. (Ex. A, Depo. p. 40) After completing all of his commercial deliveries for the day, claimant called Mr. Roberts and told him, "my back went out and I'm done, I can't do anymore." (Ex. A, Depo. p. 21) At his deposition, claimant could not recall whether he described a work-related injury to Mr. Roberts during the initial telephone call. He testified, "I don't remember exactly. I said I'm done, but I don't remember exactly what I said." (Ex. A, Depo. p. 23) However, at the evidentiary hearing, claimant definitively asserted that he described the work-related injury to Mr. Roberts. (Hr. Tr., p. 38) He testified, "I told Kevin that I was picking up a package and took it inside and went to set it down and my back went [out]." (Hr. Tr., p. 38)

According to claimant, he first felt a sharp pain in his low back as he picked a package up off a shelf in the back of his UPS truck. (Hr. Tr., pp. 32, 36-37) Claimant testified that he had been experiencing a similar pain in his low back prior to his work shift; however, the pain increased on this last, or second to last, delivery. He testified he then felt a burning sensation and his back gave out when he set the package down inside the designated store. (Hr. Tr., p. 32) Claimant could not recall how much the package weighed. (Ex. A, Depo. p. 19)

In any event, Mr. Roberts instructed claimant to contact his main supervisor, John Frederick, to have him come out and relieve him. (Id.) Mr. Frederick subsequently drove claimant's personal vehicle to the location of claimant's UPS truck and assumed the remainder of claimant's deliveries. (Hr. Tr., p. 38) At the time of his deposition, claimant could not recall whether he reported a work-related injury to Mr. Frederick. (See Ex. A, Depo. p. 23) At hearing, claimant initially testified that he told Mr. Frederick

that he had hurt his back first when speaking to him over the phone, and again when Mr. Frederick relieved him of his duties. (Hr. Tr., p. 38) However, claimant later testified he was unsure of whether he told Mr. Frederick, "I hurt my back" or "My back hurts." (Hr. Tr., p. 88)

Mr. Frederick testified that claimant did not describe a work injury to him over-the-phone or in-person. (Hr. Tr., p. 191) Mr. Frederick further provided that it was not out of the ordinary for him to relieve claimant of his job duties so he could present to a chiropractor or go home and rest. (See Hr. Tr., pp. 191-192) Mr. Frederick acknowledged that claimant appeared to be in pain.

Notably, the argument section of claimant's post-hearing brief does not assert that claimant described a work-related injury to either of his supervisors on the date of injury; rather, it simply provides claimant told Mr. Roberts that his back "went" and that he could not work the rest of his shift. (Claimant's post-hearing brief, pp. 11-12) In any event, I specifically find that claimant did not describe a work-related injury to Mr. Roberts or Mr. Frederick on the date of injury.

After being relieved of his work duties on January 7, 2019, claimant did not seek immediate medical attention. Instead, claimant drove home, where he stayed in bed for three days. (Hr. Tr., p. 42)

As Mr. Frederick alluded to in his comments about the frequency in which claimant had to be relieved of his duties, January 7, 2019, is not the first time claimant has experienced significant low back pain. Medical records indicate claimant has presented to a chiropractor for "episodes of back pain" that "limits his activity" since at least 2012. (See JE1, p. 5)

During a 2016 recertification physical for the Department of Transportation, claimant reported that his back would occasionally "go out." (JE1, p. 22) Claimant further reported that he had been hospitalized due to the same. (Id.)

In July 2017, claimant presented to orthopedic surgeon Daniel McGuire, M.D. for an evaluation of his low back pain. (JE4, p. 61) Dr. McGuire told claimant that his job at UPS was aggravating, but not damaging, his spine. He did not recommend an MRI at the time because claimant was not reporting any leg pain. (Id.) Instead, Dr. McGuire recommended claimant take better care of himself at home. (Id.) He discussed physical therapy as a treatment option; however, claimant relayed that he had tried the modality in the past without luck. (Id.)

In September 2017, claimant reported to his chiropractor that he hurt his low back bending down to pick up a package. At the time, claimant complained of intermittent sharp, aching, and stabbing pain. (JE2, p. 49) He also complained of pain in the right buttock and severe spasms. (Id.) The chiropractor's notes provide that he discussed a disk bulge with claimant and advised him to call his primary physician for a steroid. (Id.) Claimant was sent home with a TENS unit and a back belt. (Id.)

In addition to the pre-existing medical records discussed above, all witnesses agree that claimant had previously called in to the defendant employer multiple times

due to having a sore back or saying that his back was out. (See Hr. Tr., pp. 88-90, 191-195, 220-221)

Notably, claimant's low back was bothering him in the months leading up to the date of injury. (Hr. Tr., pp. 28-29, 79-81) Claimant asserts he was experiencing aching pain and tightness in his low back in October and November 2018. (Hr. Tr., p. 32) Claimant testified that as a result of his low back pain he worked fewer hours and lighter duty jobs in an effort to prepare his body for "peak season." (Hr. Tr., p. 29) Defendants dispute claimant's reasoning. According to defendants, claimant's hours were reduced because a different employee was "qualifying" on claimant's route at the time. (Hr. Tr., p. 142) When this occurs, claimant has the option of handling other tasks with less hours or driving a different route for a full day. (Hr. Tr., p. 143)

Claimant discussed his low back pain and desire to seek medical treatment with his boss, Bill Vanderah, in November, 2018. (Hr. Tr., pp. 29-31) According to claimant, Mr. Vanderah recommended that he not seek treatment until January 19, 2019, or after "peak season." (Ex. A, Depo. p. 30; Hr. Tr., p. 79) Claimant further asserts that during this conversation, Mr. Vanderah recommended claimant pursue short-term disability, as opposed to workers' compensation, so he could present to his own doctors. (Hr. Tr., p. 30) Mr. Vanderah recalled having a similar conversation with claimant where claimant inquired about the differences between short-term disability and workers' compensation; however, Mr. Vanderah denied making any recommendations regarding the same. (Hr. Tr., pp. 140-141) Moreover, Mr. Vanderah testified claimant did not indicate that his low back condition was related to his work at UPS during the November 2018 conversation. (Hr. Tr., p. 141)

Claimant did not report a work-related condition, apply for short-term disability, or seek medical treatment in October, November, or December 2018. (Hr. Tr., pp. 31, 79, 84)

The first time claimant sought medical treatment following the alleged January 7, 2019, work injury was on January 14, 2019, when he presented to his long-time chiropractor, Brent Stanley, D.C. (JE2, p. 51) Claimant did not describe a specific injury to Dr. Stanley; however, claimant did report that he hurt his low back "lifting and bending." (Id.) He further reported that an increase in pain caused him to spend 3 days in bed. (Id.)

Claimant presented to Amanda Young, D.O. of Avera Medical Group on January 16, 2019. (JE1, p. 25) The record provides,

> Aaron presents with concerns for low back pain off and on for the past 10 years, 1 weeks (*sic*) ago had worsening of his pain, unable to get out of bed for 3 days and piror (*sic*) to that only able to stand for 15 minutes at a time.

(Id.) Claimant reported no radiation of the pain except to his bilateral hips. (Id.) Claimant did not recall any specific injury when reporting to Dr. Young that his pain started one week prior. (See Id.) ("He does not recall any specific injury when his pain started a week ago.") Dr. Young opined that because claimant did not have any radiculopathy or neuropathy, and because his muscle strength was intact, there were no worrisome findings to warrant an emergent MRI. (JE1, p. 27) Instead, Dr. Young

recommended conservative treatment consisting of physical therapy, a short course of steroids, and anti-inflammatory medications. (Id.)

Claimant returned to Avera Medical Group and saw his primary physician, Travis Witt, M.D. on January 25, 2019. (JE1, p. 28) At the January 25, 2019, appointment, claimant reported that his severe back pain had been present since "the 7th." (JE1, p. 30) He denied any problems with numbness or tingling of his extremities. (Id.) He did not describe a specific injury occurring on January 7, 2019, or relay that his severe pain was work-related. (See id.)

Two days later, claimant experienced a worsening of his back condition and was ultimately transported by ambulance to the emergency room. (JE5, p. 76) There are essentially two medical records that document the emergency room visit, and they provide slightly different descriptions of how and when claimant's pain increased.

According to the EMS record, a family member requested a transport to the hospital because claimant was suffering from low back pain with the inability to move. (Id.) The EMS record provides that claimant had an acute onset of severe back pain that caused him to become weak while he was trying to go to the bathroom. (Id.) The record later explains the acute onset of pain occurred when claimant bent over to pick something up. (Id.)

According to the emergency room record, claimant got out of his bed to use the restroom and, in the process of doing so, felt a sharp, stabbing pain in his left buttock and down his left leg. (JE5, p. 80; Hr. Tr., p. 44) Claimant asserted that the pain was so bad he could not bring himself to stand. (JE5, p. 80) Claimant denied sustaining a specific injury, but relayed that he had been off work since January 7, 2019. (Id.)

Claimant initiated a stint of physical therapy on January 30, 2019. (JE5, p. 83) Claimant reported a 10-year history of chronic low back pain which had worsened since January 7, 2019. The physical therapy record also notes that claimant's pain worsened following an incident on January 27, 2019. The record provides,

> He states that on the 7th he was feeling a dull ache in the middle of the L/S, and that this past Sunday 1/27/19, he was transitioning from getting up out of bed and felt a sharp shooting "electric" pain from his L/S to his LLE. He also reports feeling a pop/crack in the middle region of his L/S when this incident occurred. He reports that it went down the back of the leg and that it went down to his ankle.

(Id.)

Just over two months out from the alleged date of injury claimant was still not describing a work-related injury occurring on January 7, 2019, to his medical providers. (See JE4, p. 62) He was, however, consistently reporting a change in his symptoms that started when he got up from bed on January 27, 2019. The notes from his March 13, 2019, appointment with Dr. McGuire, provide,

> He is still at UPS. He got through November and December. It was a very, very hectic season but he had a fair amount of help. He has had back pain

> for a long time. By early January, the back pain was so terrible he could not take it and he has been off work since January 7th. Then in early February, he got up and something changed, and he had severe left leg pain. That continues to bother him today. All of his activities are limited by leg pain.

(JE4, p. 62)

After reviewing an MRI, dated February 12, 2019, Dr. McGuire diagnosed a large extruded disc fragment on the left at L4-5 and recommended surgical intervention. (Id.; JE5, pp. 90-91) Dr. McGuire also noted, "[S]ince the fibers tore and the disc herniated his back pain is actually less severe than it was." (Id.)

On February 19, 2019, claimant returned to Dr. Witt and reported shooting pain from his lower back into his left buttocks, into the lateral side of his left leg, and into the knee with tingling into his foot and toes. (JE5, p. 93) Claimant would later report that the tingling, as opposed to the pain, was his main complaint. (JE5, p. 95) Claimant felt that his pain stemmed from his work as a delivery driver for UPS. (JE5, p. 93) He did not describe a specific injurious event, however. Following his examination, Dr. Witt recommended and performed the first of three epidural steroid injections at L4-L5. (JE5, pp. 93-94)

Dr. McGuire performed a laminectomy and discectomy at the L4-5 level on March 18, 2019. (JE5, p. 101) The surgery provided claimant with "really good relief of his leg pain," however, his low back pain persisted. (JE4, p. 66) The discharge summary notes, "a long, long history of back pain and now about 6 or 8 week history of severe left leg pain with a large extruded disk fragment." (JE5, p. 99) Despite a successful surgery, Dr. McGuire did not believe claimant could return to his position with UPS. (JE4, p. 69)

On April 2, 2019, claimant told Dr. McGuire for the first time that his low back condition was related to his work at UPS; however, he did not describe a work injury. (See JE4, p. 63) ("He is now telling me it is work related.")

Following surgery, Dr. McGuire referred claimant to NWIA Bone, Joint & Sports Surgeons in Spencer, Iowa for physical therapy. (JE6) To the undersigned's knowledge, the April 26, 2019, physical therapy report is the first medical record to document claimant's description of the alleged work injury. The record provides,

> He reports that he was working for UPS and during the middle of his shift he felt sharp pain that shot down his left leg and he couldn't move. He left for the day and went home. He reports that while at home his pain increased to a 10/10 down into his left leg to the level of his toes and he couldn't move so he called an ambulance.

(JE6, p. 103) This medical record appears to combine the alleged January 7, 2019, work injury with the January 27, 2019, incident at claimant's home. Claimant participated in physical therapy through July 2019. (See JE6, p. 119)

On May 28, 2019, claimant asked Dr. McGuire questions about converting short-term disability or long-term disability into workers' compensation. (JE4, p. 65) Dr.

McGuire advised claimant to speak with a union representative regarding the same. (Id.)

At the time, claimant had been receiving short-term disability benefits through an employer-funded plan for approximately 4 months. (See Hr. Tr., p. 121) Claimant applied for short-term disability benefits shortly after the alleged date of injury. (Hr. Tr., p. 120) When applying for the same, claimant indicated his low back condition was not the result of a work-related injury. (See Hr. Tr., p. 91)

In July 2019, claimant applied for long-term disability benefits. Again, claimant indicated on his application that his low back condition was not the result of a work injury. (See Hr. Tr., p. 91) Claimant received long-term disability benefits for the time period between July 24, 2019 and July 2, 2020. (Ex. J, pp. 56-64)

Prior to exhausting his long-term disability benefits, claimant applied for Social Security Disability benefits on May 25, 2020. (Ex. H, p. 34) When asked if his condition was work-related, claimant again answered, "No." (Ex. H, p. 35) Then, on June 26, 2020, claimant filed his petition for workers' compensation benefits against defendants. Defendants assert this is the first notification they received from claimant that a work-related injury occurred on January 7, 2019. As such, defendants denied Mr. Carpenter's claim based on a lack of timely notice. Defendants would later deny Mr. Carpenter's claim based on causation, as well.

Two physicians have offered causation opinions in this case.

Defendants scheduled claimant for a March 17, 2021, evaluation with Michael Espiritu, M.D. (Ex. E, p. 25) Dr. Espiritu's IME report documents claimant's description of the alleged work injury. Claimant reported that he was, "picking up a box of unknown weight" when he experienced increased back pain. (Id.) Dr. Espiritu noted the contemporaneous medical records do not describe claimant injuring his low back after lifting a package. (Ex. E, p. 26)

During the interview portion of the IME, Dr. Espiritu questioned claimant about his reporting of the January 7, 2019, date of injury. The record provides:

> When asked him [sic] whether or not he actually reported the January 7, 2019 injury as a work comp related event or work-related, at first he made it sounded [sic] as if he told his boss that occurred at work and that his boss told him to not use the work comp doctors but to use his own doctors, but he then recanted that and said that again his pain had been starting prior to work that he was requested to come in and work anyway, and that he did not necessarily tell his direct supervisor or anyone with documentation that this was a work comp related event on January 7, 2019. When asked the patient what made him decide to actually tell someone that this was work comp related on June 2020 well after treatment, he replied that it was because he was not as good as he thought he should be after he already had the intervention which was a surgery by Dr. McGuire.

(Ex. E, p. 25)

After reviewing claimant's medical records, interviewing claimant, and conducting a physical examination, Dr. Espiritu opined claimant's lumbar spine condition was not caused or aggravated by the alleged work injury on January 7, 2019. (Ex. E, p. 29) More specifically, Dr. Espiritu opined that the work injury claimed on January 7, 2019, did not cause the condition that resulted in the laminectomy and it was not a substantial factor in aggravating, accelerating, or exasperating his pre-existing condition. (Id.)

Claimant sought an independent medical examination with Sunil Bansal, M.D. (Ex. 1) The examination occurred on March 11, 2021; however, the report was not produced until sometime after Dr. Bansal received and reviewed Dr. Espiritu's report. (Ex. 1, p. 1) Dr. Bansal's report provides that claimant injured his back when he bent over, lifted a package that weighed approximately 20 pounds, and heard a "pop" in his back. (Ex. 1, p. 9) Claimant did not testify to hearing a "pop" in his back at his deposition, evidentiary hearing, or supplemental evidentiary hearing. Additionally, claimant did not know how much the package weighed at the time of his deposition.

Ultimately, Dr. Bansal causally related claimant's low back condition to the alleged January 7, 2019, work injury. (Ex. 1, p. 12) More specifically, Dr. Bansal opined that claimant incurred an acute disc herniation at L4-L5 when he bent over and lifted the 20-pound package on January 7, 2019. (Id.) He explained, "Disc pressure is increased 100 to 400% in the forward flexed spine position, greatly increasing the likelihood of disc bulging and annular tearing." (Id.)

Defendants challenge and critique Dr. Bansal's causation opinions, asserting his opinions are not based on an accurate description or understanding of the contemporaneous medical records. (Defendants' post-hearing brief, p. 23) Dr. Bansal's causation opinion is certainly reasonable. It is conceivable that claimant, a UPS delivery driver, could sustain an injury to his low back from picking up a package at work. However, as defendants correctly point out, Dr. Bansal's report fails to adequately consider several factors.

Dr. Bansal's report does not adequately consider the contemporaneous medical records providing claimant did not recall or describe a specific injurious event. (See JE1, p. 25; JE2, p. 51) While claimant eventually told Dr. McGuire of his belief that his low back pain was related to his work activities, he did not report the same to his employer, and the only medical records to describe the alleged injury with any specificity are the IME reports of Dr. Espiritu and Dr. Bansal, which took place two years after the alleged date of injury.

The undersigned notes that Dr. Bansal's report also fails to adequately address claimant's condition prior to presenting for work on the morning of January 7, 2019. (Ex. A, Depo. p. 22; see Hr. Tr., p. 88)

Defendants also point out that Dr. Bansal's causation opinion relies on an incorrect or unsubstantiated mechanism of injury. (Defendants' post-hearing brief, p. 15) According to Dr. Bansal, claimant was injured when he "bent over and lifted a package that weighed approximately 20 pounds." (Ex. 1, p. 9) Claimant's testimony does not

indicate he was bending to lift a package on January 7, 2019; rather, he lifted a package from a shelf in the back of his truck. (Ex. A, Depo. p. 19; Hr. Tr., p. 32). Moreover, he testified he could not recall the weight of the package. (Ex. A, Depo. p. 19)

Defendants similarly point out that the contemporaneous medical records do not describe claimant feeling or hearing a "pop" in his back on January 7, 2019. Rather, the only medical record to reference a "pop" in claimant's back stems from the January 30, 2019, physical therapy record wherein claimant described feeling a "pop/crack" in the middle of his back when he got out of his bed to use the restroom on January 27, 2019. (JE5, p. 83) Dr. Bansal did not address the fact claimant did not complain of radiating pain into the left leg until the January 27, 2019, incident at home.

Given Dr. Bansal's failure to address these inconsistencies in his report, I do not find his causation opinion convincing. Without a credible expert opinion, I find insufficient evidence that claimant's low back condition was caused or materially aggravated by the alleged work injury on January 7, 2019.

In comparison, Dr. Espiritu addresses the contemporaneous medical records, the progression of claimant's radiculopathy, the discrepancies in claimant's reporting of the injury, and the status of claimant's low back pain immediately prior to the alleged work injury. Dr. Espiritu discussed the progression of claimant's symptoms between October 2018 and February 2019. He ultimately opined that claimant's lumbar spine condition was not caused or aggravated by the alleged work injury on January 7, 2019, and he could not pinpoint when the disc herniation occurred based on the contemporaneous medical records. I find Dr. Espiritu's opinion is reasonable and persuasive.

Having considered claimant's testimony, the testimony of Jamie Igou, Bill Vanderah, John Frederick, and Kevin Roberts, the contemporaneous medical records, and the causation opinions of Dr. Bansal and Dr. Espiritu, I find that claimant failed to prove his work activities on January 7, 2019, caused, materially aggravated, or accelerated his low back condition and need for surgical intervention.

I similarly find that Mr. Carpenter did not give timely notice of the alleged January 7, 2019, work injury.

At his deposition, claimant could not recall whether he described a work-related injury to Mr. Roberts during the phone call. He testified, "I don't remember exactly. I said I'm done, but I don't remember exactly what I said." (Ex. A, Depo. p. 23) Mr. Roberts was unable to confirm or deny claimant's testimony in this regard.

Claimant similarly could not recall whether he reported a work-related injury to Mr. Frederick. (Ex. A, Depo. p. 23) At hearing, claimant initially testified that he told Mr. Frederick that he had hurt his back first when speaking to him over the phone, and again when Mr. Frederick relieved him of his duties. (Hr. Tr., p. 38) However, claimant later testified he was unsure of whether he told Mr. Frederick, "I hurt my back" or "My back hurts." (Hr. Tr., p. 88)

Mr. Frederick testified that claimant did not describe a work injury to him over-the-phone or in-person. (Hr. Tr., p. 191) In this regard, I find Mr. Frederick's testimony

at hearing to be credible. I similarly find Mr. Vanderah's testimony at hearing to be credible. Lastly, I find Mr. Roberts' testimony at hearing was generally credible; however, I did not find Mr. Roberts' testimony to be particularly helpful in this matter.

Notably, the argument section of claimant's post-hearing brief does not assert that claimant described a work-related injury to either of his supervisors on the date of injury; rather, it simply provides claimant told Mr. Roberts that his back "went" and that he could not work the rest of his shift. (Claimant's post-hearing brief, pp. 11-12) In any event, I specifically find that claimant did not describe a work-related injury to Mr. Roberts or Mr. Frederick on the date of injury. This finding is supported by the evidentiary record as a whole.

The contemporaneous medical records do not describe a work-related injury. In fact, the initial medical records specifically provide claimant did not recall any specific injurious event. (See JE1, p. 25; JE2, p. 51) Additionally, when applying for short-term disability benefits, long-term disability benefits, and Social Security Disability benefits, claimant indicated his low back condition was not the result of a work-related injury. (See Hr. Tr., p. 91; Ex. H, p. 35) It is difficult to imagine claimant definitively reporting a work injury to his supervisors only to deny the same when presenting for medical treatment and filling out disability paperwork.

I find that the defendant employer has proven it did not receive notice of the alleged injury until approximately June 26, 2020, when claimant filed his petition for workers' compensation benefits against defendants. Accordingly, I find that the employer proved by a preponderance of the evidence that defendants did not have actual knowledge of the alleged January 7, 2019, injury and that Mr. Carpenter did not give notice of the injury within 90 days after it was alleged to have occurred.

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" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (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).

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).

Claimant bears the burden to establish that his injury arose out of and in the course of his employment with UPS. Having found that Mr. Carpenter did not carry this burden of proof and that he failed to prove his injury was caused, materially aggravated, or accelerated by his work activities at UPS, I conclude that claimant failed to prove he sustained a compensable work injury on January 7, 2019.

The above conclusion that claimant failed to carry his burden of proof renders all other issues moot. However, in light of the fact my decision could be appealed, I elect to render additional findings and conclusions on the affirmative defense asserted by defendants.

Defendants contend claimant failed to give timely notice of his injury and that his claim is barred by 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. For the purposes of this section, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.

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. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant asserts that he sustained a work-related injury on January 7, 2019. He further asserts that he either reported the injury to his supervisors on the date of injury, or his supervisor possessed actual knowledge of a work-related injury by speaking to claimant and/or observing claimant's physical condition on the date of injury.

Defendants cite two cases to address the actual knowledge portion of claimant's argument. Johnson v. Intern'l Paper Co., 530 N.W.2d 475, 477 (Iowa App. 1995); Ross v. American Ordnance, File No. 16-0787, filed January 11, 2017 (Iowa Ct. Appeals), Unpublished, 895 N.W.2d 923 (Table).

The facts of this case are akin to the facts in Ross v. American Ordnance, File No. 16-0787, filed January 11, 2017 (Iowa Ct. Appeals), Unpublished, 895 N.W.2d 923 (Table).

In Ross, the claimant told her supervisor that she hurt her shoulder. She later claimed that she told her supervisor, "a box has fallen, I hurt my shoulder." The supervisor did not ask if she was injured while performing her job. He did, however, offer to call an ambulance or direct the claimant to seek medical treatment, but the claimant declined. Five months later, the claimant filled out an accident report noting she injured her right shoulder when a box started to fall off the line and she grabbed it to keep it from falling. The commissioner found:

> It was not enough for [Ross] to simply tell her supervisor that she had shoulder pain. [Ross] needed to tell the employer she thought her shoulder problem was related to her job. [Ross] needed to alert the employer that it was necessary to investigate a work-related injury.

The commissioner's decision was affirmed by the district court and court of appeals. Ross v. Am. Ordnance, 895 N.W.2d 923 (Iowa Ct. App. 2017)

Like the claimant in Ross, Mr. Carpenter's hearing testimony is significantly different from his deposition testimony. During his deposition, claimant could not recall whether he described a work-related injury to Mr. Roberts during the initial telephone call. He testified, "I don't remember exactly. I said I'm done, but I don't remember exactly what I said." (Ex. A, Depo. p. 23) Claimant gave a significantly different story at hearing. At the evidentiary hearing, claimant definitively asserted that he described the work-related injury to Mr. Roberts. (Hr. Tr., p. 38) He testified, "I told Kevin that I was picking up a package and took it inside and went to set it down and my back went [out]." (Hr. Tr., p. 38) Claimant provides no explanation as to why his memory of what occurred on the date of injury was so different and more detailed at hearing than it was

when he was deposed. Because claimant's testimony at hearing is significantly different than his deposition testimony, and because I found the testimony of Mr. Frederick, Mr. Vanderah, and Mr. Roberts credible, I find claimant's testimony at hearing was not credible.

Claimant's discussions with Mr. Roberts and Mr. Frederick on the alleged date of injury were not sufficient to tell the defendant employer that his back problems were work-related or specifically related to an injurious event at work. It is not enough for claimant to tell his supervisor that he had back pain. Johnson v. Intern'l Paper Co., 530 N.W.2d 475, 477 (Iowa App. 1995); Ross v. American Ordnance, File No. 16-0787, filed January 11, 2017 (Iowa Ct. Appeals), Unpublished, 895 N.W.2d 923 (Table) It is also not enough for claimant to tell his supervisor that his back went out. The phrase, "my back went out" does not imply a work-related event occurred any more than the phrase, "I hurt my shoulder." Ross at 1. This is particularly true in the matter at hand where claimant contacted the employer prior to his shift and expressed significant doubt that he would be able to make it through his shift due to his severe back pain. Moreover, all parties agree claimant routinely reported the same to the defendant employer without indicating that the same was work-related. (See Hr. Tr., pp. 88-90, 191-195, 220-221)

Claimant was obligated to give notice of his injury to the employer within 90 days of the date. I found claimant did not give express notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence. I further found that the employer did not have actual knowledge of the occurrence of a work-related injury. Mr. Carpenter knew all of these things on January 7, 2019, yet he did not give notice within 90 days of January 7, 2019.

I conclude that defendants established each of the necessary factors of their notice defense by a preponderance of the evidence. Therefore, even if the low back condition was caused, materially aggravated, or accelerated by his work activities on January 7, 2019, I conclude that the claim is barred for failure to give timely notice under Iowa Code section 85.23. Mr. Carpenter is not entitled to an award of benefits in this case.

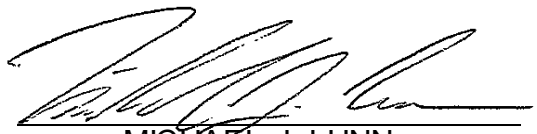
Lastly, Claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Claimant failed to establish entitlement to any additional workers' compensation benefits. Therefore, I conclude that it is not appropriate to assess claimant's costs in this action.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

Signed and filed this _____10th____ day of May, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mary Hamilton (via WCES)

Lara Plaisance (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.