BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM J. WEEDON,

Claimant,

vs.

CITY OF DAVENPORT,

Employer,
Self-Insured,
Defendant.

File No. 5060977

ARBITRATION DECISION

Headnotes: 2801, 2802, 1803, 2500, 4000

STATEMENT OF THE CASE

William Weedon, claimant, filed a petition in arbitration seeking workers' compensation benefits from the City of Davenport (the City or Davenport) as a result of an alleged injury he sustained on June 20, 2017 that allegedly arose out of and in the course of his employment. This case was heard in Davenport, Iowa and fully submitted on May 1, 2019. The evidence in this case consists of the testimony of claimant, Arthur Bartleson, Dawn Weedon, Joint Medical Exhibits 1 – 17 (JME) and Joint Non-Medical Exhibits 1 – 19 (JE). Both parties submitted briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On 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.

ISSUES

1. Whether claimant sustained an injury on June 20, 2017 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
3. Whether the alleged injury is a cause of permanent disability and, if so;
4. The extent of claimant's disability.
5. Commencement date for any permanent partial disability benefits.
6. Whether claimant provided timely notice of an injury to the defendant.

7. Whether claimant is entitled to payment of certain medical expenses.

8. Whether claimant is entitled to payment for an independent medical examination.

9. Whether penalty should be assessed.

10. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

William Weedon was 53 years old at the time of the hearing. Claimant graduated from high school. Claimant has no other formal education. (Transcript page 23) Claimant started working for the City in 2001. Claimant's primary work before working for the City was doing auto body work in a number of different shops. (Tr. p. 24: JE. 7, p. 11)

Claimant started his work with the City as a street maintenance worker and became a street equipment operator between five and eight years ago. (Tr. p. 24) Claimant was working as a street equipment operator in June 2017. In the summer claimant would work repairing and replacing streets. Claimant would use a variety of equipment to tear out and replace asphalt including a Bobcat, loaders, sweepers and a flusher. He would also perform labor. (Tr. p. 24) Claimant's supervisor described claimant's work as,

> Q: Can you tell the Deputy what - - in your own words, job description of what Mr. Weedon does at this time?
>
> A. Bill's primary duties are street equipment operator, which could be running street sweepers, flushers, rollers, end loaders, Bobcats, broom, shovel, down to throwing sandbags.
>
> B. Q. Okay. Would you describe him as a hard worker?
>
> C. A. Very hard worker.

(Tr. p. 69) In the winter claimant runs a snowplow and salt truck. (Tr. p. 25)

Claimant testified that on June 20, 2017 he was working on asphalt replacement. (Tr. p. 29) He would operate a Bobcat that had rougher suspension/hydraulics than other Bobcats: This was Bobcat 485. (Tr. p. 27) Mr. Bartleson, claimant's supervisor, agreed that claimant and two other employees had complained about how Bobcat 485 operated. (Tr. pp. 94 – 96)

Claimant testified that his back started hurting at work the week of June 20, 2017. (Tr. p. 29) Claimant said that by the week of June 26, 2017 his back got worse and pain started to shoot down his right leg. (Tr. p. 29; JE 14, p. 43)

Claimant said that on or about June 22, 2017 he was operating Bobcat 485 and asked his lead man, Jeff Lopshire if he could get out and have someone else run this machine. (Tr. p. 33) A co-worker, Jim Carlson, volunteered to take over running Bobcat 485 and was told he could not, and claimant continued to operate Bobcat 485. (Tr. p. 34) Claimant said he told Mr. Lopshire his back was hurting and that Bobcat 485 was bouncing him around. (Tr. p. 34)

Mr. Lopshire testified via deposition. He is a heavy equipment operator for the City and in that role is a lead man. (JE. 17, p. 5) Mr. Lopshire agreed that claimant was at the job site that Mr. Carlson identified around the week of June 26, 2017.

Claimant saw Matthew Meyer, D.C. on June 26, 2017. (Tr. p. 35; JME 1, p. 1) Dr. Meyer had treated claimant in the past. In 2014 claimant had a few treatments due to back pain from shoveling snow and in 2015 D. Meyer treated claimant's back after claimant moved boxes. (Tr. p. 36)

Claimant testified that Dr. Meyer's treatment on June 26, 2017 did not help his back. Claimant also had treatment by Dr. Meyer on June 29, 2017. Claimant took June 30, 2017 off so that he could have a long 4th of July holiday. (Tr. p. 37) Claimant went to a car show to show his car and saw his supervisor Arthur Bartleson there. Claimant stated in answers to interrogatories that he did not sustain any acute injury over the 4th of July holiday. (JE. 7, p. 14)

Claimant returned to work on July 5, 2019. Claimant worked a partial day and left work due to back pain. Claimant said he had difficulty walking and told Mr. Bartleson. (Tr. p. 58) Claimant saw Dr. Meyer on that day, was referred to Jose Armendariz, M.D. and was seen on July 7, 2017. (JME 3, p. 31) Dr. Armendariz referred claimant for an MRI and to Myles Luszczyk, D.O. who saw claimant on July 11, 2019. (JME 5, pp 48 – 51)

Claimant was having a difficult time getting up and walking at the time he saw Dr. Luszczyk. Claimant was using a wheelchair and walker. (Tr. p. 42) Claimant was told by Dr. Luszczyk that he could be paralyzed if he did not have back surgery. Claimant had back surgery on July 12, 2017. Claimant testified that Dr. Luszczyk thought his injury was work related. Claimant attempted to file a work injury report while he was still in the hospital. (Tr. p. 43) Claimant used his personal sick time for four and one half months while recovering from surgery. (Tr. p. 48) Claimant was off work from July 12, 2017 through November 13, 2017. (Tr. p. 60) Claimant returned to regular work for the City on November 14, 2017. Claimant is working the same hours and earning the same pay under the union contract. (JE. 14, p. 25)

Claimant provided a statement to the risk management section of the City from co-worker Jim Carlson that corroborated that claimant was complaining of pain due to operating a Bobcat for the City. (Tr. p. 48; JE. 19; Depo. Ex. 3) Claimant received a letter from the City dated September 21, 2017 denying claimant's claim of a work injury. (Tr. p. 43; JE 6, p. 9)

Claimant agreed that his name was not on the asphalt worksheet for June 20, 2017. He also acknowledged that on the street tracking log, the log indicated he was doing CDL training on June 20, 2017. (Tr. p. 50) On redirect examination claimant stated that the June 20, 2017 date of injury was an approximation of the date. (Tr. p. 64) Claimant believed that his low back symptoms occurred in June 2017 and the right leg radiating pain occurred on June 26, 2017. (Tr. p. 67)

Dawn Weedon, claimant's spouse of 23 years, testified at the hearing. Ms. Weedon said that after claimant was injured in June of 2017 he has had to modify his activities. She said that claimant is not able to do things as fast as he used to and needs to ask for help. She said that claimant was frustrated in the slower pace that he has to perform some tasks. (Tr. p. 20)

Claimant said he has pain in his lower back and he cannot feel the top of his legs from his knees to his hips. (JE. 14, p. 34)

Arthur Bartleson, Street Operations Supervisor for the City, testified. Mr. Bartleson is claimant's supervisor currently and at the time of his alleged injury. (Tr. pp. 9, 68) Mr. Bartleson was in his office and was told by the claimant on June 26, 2017 he had a sore back. (Tr. pp. 9, 13) In his deposition Mr. Barlteson testified about a conversation he had with claimant,

> A: The conversation was is [sic] that he had had an issue the week before when I was gone on vacation where his back was sore from running the Bobcat. He explained to me that Jeff Lopshire - - he asked to be taken out of the Bobcat and Jeff basically told him he had to run it. I asked him if he needed to go to the clinic to get it addressed. And he said, no, my back is always a little sore, I think I'll be okay.

(JE. 18, depo. p. 25) Mr. Bartleson testified that he offered to refer claimant to Genesis Medical Occupational Heath, the facility the City uses to treat injured employees. (Tr. p. 15) Mr. Bartleson said that after claimant returned to work after his surgery claimant has not shown a decrease in efficiency or productivity. Mr. Bartleson described claimant's current work as outstanding. (Tr. pp. 69, 70) Claimant works 40 hours per week plus overtime, and in the winter of 2018/2019 he worked weeks of up to 60 – 65 hours. (Tr. p. 70) Mr. Bartleson provides work and equipment assignments to lead men for each day. The lead men make specific assignments of work based upon who is assigned to the equipment. (Tr. pp. 71, 72)

Mr. Bartleson testified that based upon a review of record he believes claimant was providing CDL training on June 20, 2017. (Tr. 73) Mr. Bartleson testified that claimant did not report an injury to him between June 20 and July 4, 2017. (Tr. p. 74) Mr. Bartleson said that on June 26, 2017,

> A. He come in and explained to me that he had a sore back. I asked him if he wanted to go to the clinic. He said, no, that he has had a sore back for a while. And he said he had a conversation - - he had a problem with Jeff Lopshire while I was on - - gone on vacation, that he was having issues with the Bobcat making his back sore and asked to get out of it, and Jeff Lopshire refused to let him get out of the machine. Said he had to continue to run it.

(Tr. p. 75)

The City filed a First Report of Injury (FROI) on August 1, 2017. The FROI lists the date of claimant's injury as June 26, 2017, that the employer had knowledge of the injury on July 5, 2017 and the claim administrator had knowledge of the injury on July 17, 2017. (JE. 1, p. 1) An incident report was competed on July 17, 2017 which stated that claimant reported a sore back due to operating a Bobcat. On August 21, 2017 claimant wrote on the incident report that his back was sore before June 26, 2017 due to operating a Bobcat. (JE. 2, p. 2) The City sent claimant a letter dated September 21, 2017. The letter stated in part,

> On July 18, 2107 [sic], the Risk Division received and [sic] incident report alleging an injury to your back on June 26, 2017 while operating a bobcat. Prior to you filing of the incident report, you required emergency surgery to address severe spinal stenosis and degenerative disc disease. Because no report of an injury was reported by you until after surgery, an investigation was opened and conducted by the Risk Division.
>
> Following an extensive investigation, records of that investigation were provided to the City's occupational health doctor, Dr. Garrels to determine causation. After a thorough review of our investigation, Dr. Garrels was not able to identify a mechanism of injury relating to your employment. In fact, your medical records indicate chronic back problems have existed for several years.
>
> Due to these findings, the City of Davenport must respectfully deny your claim and any care to your back. Any bills for medical treatment should be submitted to your health insurance carrier for payment

(JE. 6, p. 9)

Mr. Bartleson noticed that claimant was having difficulty in walking and sitting down when he reported to work on July 5, 2017. Mr. Bartleson asked claimant if he

thought he could work and claimant said he was going to try to stick it out. (Tr. p. 84) Claimant was unable to work his full shift and told Mr. Bartleson he was going to see his chiropractor. (Tr. p.84

Mr. Bartleson identified the claimant coming out of a locker room at the end of his shift on June 26, 2017 at 13:57 minutes in the video, which is part of Joint Medical Exhibit 8. He also identified claimant in a June 29, 2017 video at 13:42 and on a July 5, 2017 video when claimant checked in and punched out. (Tr. p. 85)

Jim Carlson testified via deposition. Mr. Carlson is a street equipment operator who works with claimant. Mr. Carlson operates a Bobcat and is generally assigned to Bobcat 486. Mr. Carlson has operated Bobcat 485 and described it as ten times worse than the Bobcat he generally runs. Mr. Carlson said that Bobcat 485 is bouncier and jerky than the Bobcat he generally operates. Mr. Carlson has reported how poorly Bobcat 485 operates at least three times. (Ex. 15, p. 12) The City provided an affidavit from the engineering manager who stated there were no written write-ups for Bobcat 485 between May 2017 and July 2017. (Ex. 19, Depo. Ex. 5) Mr. Carlson submitted a statement signed August 27, 2017 that he had explained to Brad, of the City's repair shop, how Bobcat 485 could be fixed. Mr. Carlson reported he told Mr. Bartleson after claimant had been injured Mr. Bartleson would look into whether Bobcat 485 had been repaired. (Ex. 19; Depo. Ex. 2)

Mr. Carlson said he was aware that claimant had a work injury in June 2017. Mr. Carlson said claimant was operating his Bobcat and told Mr. Carlson his back was hurting "real bad." (JE. 15, p. 19) Mr. Carlson offered to operate Bobcat 485 and have claimant operate his machine, but Mr. Lopshire said no. (Ex. 15, p. 19; Ex. 19, Depo. Ex. 3)

Dicky Owens testified via deposition. Mr. Owens is a heavy equipment operator for the City. Mr. Owens has operated Bobcat 485. He said that all the Bobcats are bouncy and jerky, but Bobcat 485 is probably more than the other ones. (JE. 16, pp. 7, 9) Mr. Owens was told by claimant that he hurt his back the day of or day after due to bouncing in a Bobcat. Claimant informed him he was going to see a chiropractor. (JE.16, pp. 18, 19)

Jeff Lopshire testified via deposition. Mr. Lopshire is a heavy equipment operator and a lead man for the City. The claimant was assigned to work with Mr. Lopshire on some days in June 2017. Mr. Lopshire reviewed the statement that Jim Carlson wrote, (JE. 19, Depo. Ex. 3), and agreed that he was informed that claimant's back was hurting from operating the Bobcat. (JE. 17, pp. 17, 18)

Sunil Bansal, M.D. charged claimant $564.00 for the examination portion of the IME and $2,204.00 for the report for a total of $2,768.00. (JE. 11, p. 39) Claimant is

also seeking mileage in the amount of $67.61 for his visit with Dr. Bansal. (JE. 11, p. 38) Claimant is seeking costs for the following,

1. IWCC Filing Fee	$100.00
2. Cert. Mail	$6.67
3. Medical Opinion of Dr. Matthew Meyer	$200.00
4. Medical Opinion of Dr. Myles Luszczyk	$310.00
5. Subpoena to Dr. Rick Garrels	$20.00

. . . .

7.Deposition Transcripts of James Carlson, Dick Owens,

Jeff Lopshire, and Art Bartleson $626.60

(JE. 13, p. 44)

Claimant is seeking medical mileage in the amount of $262.19 for his treatment. (JE. 12, p. 43) Claimant is seeking payment of medical out-of-pocket expenses of $1,129.18. (JE. 12, p. 42)

Claimant testified he was seen by his family doctor, Niral Tilala, M.D. on March 27, 2014 due to adverse reactions to medication, which was causing leg cramping and back pain. (Tr. p. 44; JME 2, pp.19 – 21)

The evidence shows claimant received some chiropractic treatments by Dr. Meyer for his back before his June 2017 injury. Claimant was seen for back complaints twice in February 2014, once in November 2015, once in September 2016 and three times in October 2016. (JME 1, pp. 1 – 7) On Monday, June 26, 2017 Dr. Meyer saw claimant for significant low back and right sacroiliac pain and mid-back pain to a lesser degree. (JME 1, p. 8) Claimant returned to Dr. Meyer on June 29, 2017 for additional treatment. (JME 1, p. 9)

On July 5, 2017 claimant reported to Dr. Meyer he had been doing slightly better until it became worse and he had to leave work that morning. (JME 1, p. 10) Claimant saw Dr. Meyer on July 7, 2017 and described his back as worse. Dr. Meyer noted that claimant could have a disc problem and recommended claimant contact an orthopedic physician. (JME 1, p. 12)

On July 7, 2017 claimant's primary care physician, Dr. Armendariz evaluated claimant for, "Acute on chronic low back pain that has been present since this past week." (JME 3, p. 31) Claimant denied any specific injury but described his job as

physical. (JME 3, p. 31) Dr. Armendariz assessed claimant with acute low back pain and was concerned for a protruding disc. Dr. Armendariz provided prednisone, muscle relaxers and pain medication. (JME 3, p. 32) On July 10, 2017 Dr. Armendariz noted claimant was using both a wheelchair and crutches due to his pain. An MRI performed on July 10, 2017, "[S]howed a large central disc protrusion at L2 and L3 with material hanging well below the disc space filling up the left and right lateral recesses along with severe stenosis." (JME 3, p. 38) Dr. Armendariz's assessment was,

> 1. Acute on chronic low back pain with disc protrusion and severe central canal stenosis, unchanged, at this time we will coordinate care with orthopedic spine and set the patient up for an urgent visit as quickly as possible to discuss various treatment options. We will hold off on sending him for an epidural steroid injection and if her injections to their care at this time. We will continue treatment with muscle relaxers, pain medicines, facilitate the referral. The patient was instructed to go directly to the emergency department for any worsening symptoms he has not seen the orthopedic spine specialist or of [sic] his condition worsens.

(JME 3, p. 39)

On July 11, 2017 Myles Luszczyk, D.O. examined claimant. Dr. Luszczyk recorded in his notes,

> Bill does report that he has had some back issues on and off throughout his life, but most recently while at work, did notice a resurgence in his back pain to the point where now he has developed shooting pains down the legs. He really denies any specific trauma, but he does work with vehicles where there is a significant degree of vibration.

(JME 5, p. 48) Dr. Luszczyk's assessment was,

> ASSESSMENT: At this point, is a 51-year-old male, with multilevel degenerative disk disease lumbar spine, history of tobacco usage with severe central stenosis L2-L3 level with critical obliteration of the thecal sac and canal and impending neurologic deficit. I have expressed to the patient and the patient's wife that I do have grave concern regarding the high-grade stenosis that is noted. Patient has essentially been relegated to a wheelchair as he cannot stand or walk without any significant pain, although there is always the potential of conservative measures including injections, physical therapy. I think this is actually a very dangerous situation and we would put him at risk for complete loss of function and at this level, if he were to lose function, this would essentially render him a paraplegic.

(JME 5, p. 49) Dr. Luszczyk admitted claimant for surgery scheduled for the next day, July 12, 2017. (JME 5, p. 50) On July 12, 2017 Dr. Luszczyk performed surgery. His postoperative diagnosis was, "Severe central stenosis secondary to large central extruded fragment L2 – L3 impending neurologic deficit, history of tobacco usage." (JME 5, p. 52) Claimant had decompression laminectomy at L2 – L3 with fusion at L2 – L3. (JME 6, p. 59) Claimant was taken off work status as of July 12, 2017. (JME 6, p. 58) Claimant was returned to work without any restrictions as of November 13, 2017. (JME 6, p. 67)

On September 20, 2017 Rick Garrels, M.D. provided a causation opinion to the City. Dr. Garrels wrote that providers imply claimant had a chronic pre-existing back issue. (JME 8, p. 78) Dr. Garrels noted that Dr. Meyer did not report that claimant had reported an acute injury on June 26, 2017. Dr. Garrels viewed video of claimant on various days in June and July and noted that it was not until July 5, 2017 that the video showed a significant functional difference in the claimant. (JME 8, p. 78) Dr. Garrels wrote, "One would deduce there was an acute injury event after 6/29/2017, his last day of work prior to the holiday, that lead to a change from his chronic pre-existing state. None of the providers' documentation delineate any acute event leading to this exacerbation." (JME 8, p. 78)

On February 20, 2018 Dr. Luszczyk responded to questions from claimant's attorney. Dr. Luszczyk indicated his agreement to the following questions:

1. It is my opinion stated within a reasonable degree of medical probability (i.e. more likely than not), that William Weedon sustained an injury to his back while working for the City of Davenport on or about June 20, 2017.

2. It is my opinion, stated within a reasonable degree of medical probability (i.e. more likely than not), William Weedon substantially aggravated, exacerbated, 'lit up,' or worsened preexisting conditions as a result of his work injury on or about June 20, 2017.

(JME 6, p. 71) Dr. Luszczyk did not check or agree that claimant had a new injury on or about June 20, 2017. Dr. Luszczyk was unable to state with a reasonable degree of medical certainty that claimant's work injury caused his annular tear, as he had no way to prove it. (JME 6, pp. 71, 72)

On December 19, 2018 Dr. Meyer filled out a letter/form with questions posed by claimant's counsel and also wrote a letter concerning claimant. Regarding the claimant's back issues before June 2017, Dr. Meyer wrote,

1. It is my opinion within a reasonable degree of medical probability that Mr. Weedon did not have 'chronic pre-existing back issues' as stated by Dr. Garrels in his report dated 09/20/2017. Since early 2014 I have treated Mr. Weedon occasionally for mild neck and back discomfort

> that was caused by normal activities – shoveling snow, yard work etc. These episodes always completely resolved with one to three treatments and did not interfere with work or normal activities of daily living.

(JME 1, p. 13) Dr. Meyer noted that he recalled conversation with claimant on July 5 and July 7, 2017 that claimant reported the Bobcat he was operating was very rough when this episode of back pain began. (JME 1, p. 1) In his response Dr. Meyer agreed that claimant did not have chronic pre-existing back issues. Dr. Meyers agreed that claimant injured his back while working for the City on or about June 20, 2017. (JME 1, pp. 16, 17)

On January 21, 2019 Chad Abernathey, M.D. examined claimant and responded to defendant concerning claimant's condition. Dr. Abernathey noted that there was some discrepancy as to the date of claimant's injury, however, "Assuming that his alleged incident occurred and was responsible for his presentation of disc extrusion and stenosis; I would consider him to have a 7% whole body impairment rating." (JME 10, p. 86) Dr. Abernathey did not recommend any restrictions. (JME 10, p. 86) Dr. Abernathey noted claimant presented with mild residual symptomatology consistent with preoperative cauda equina syndrome. (JME 10, p. 88)

On February 5, 2019 Dr. Bansal issued an independent medical examination (IME) report. (JME 12, pp. 97 – 109) Dr. Bansal's examination showed a loss of sensory discrimination over the right anterolateral thigh and a loss of sensory discrimination over the left lateral thigh. (JME 12, p. 105) Dr. Bansal's assessment was, "Aggravation of lumbar spondylosis at L2-L3. Status post fusion L2-L3 (July 12, 2017)." (JME 12, p. 106) Dr. Bansal concluded that claimant's back condition was aggravated by the cumulative effects of operation of a Bobcat. (JME 12, p. 106) Dr. Bansal recommended lifting restrictions of no lifting over 40 pounds, no frequent bending or twisting, no prolonged standing or walking greater than 30 minutes and to avoid heavy equipment operation secondary to whole body vibration. Dr. Bansal provided a 20 percent whole body rating. (JME 12, p. 109)

On February 8, 2019 Dr. Garrels evaluated the opinions of Dr. Meyer, Dr. Abernathey and Dr. Bansal. (JME 8, pp. 81 – 83) Dr. Garrels disagreed with Dr. Meyer concerning whether claimant had a pre-existing degenerative state concerning his low back. Dr. Garrels also states that upon the review of equipment assigned claimant was not injured by using a Bobcat on the day of the alleged injury. Dr. Garrels was not able to identify how Dr. Abernathey derived a rating of the claimant.

In reviewing Dr. Bansal's IME Dr. Garrels made specific note of treatment claimant had in March of 2014. Dr. Garrels referred to this as neurogenic claudication.

(JME 8, p. 82) [1] Dr. Garrels also noted that Dr. Armendariz had noted on July 7, 2017 claimant reported his back locking. Dr. Garrels said those two records were important to show the longevity and severity that the patient was having. Dr. Garrels wrote, "Why the patient had not been seeking more aggressive treatment at an earlier stage is baffling to me." (JME 8, p. 82) Dr. Garrels disagreed with Dr. Bansal's opinion that claimant's work in the Bobcat would contribute to degeneration at the L2 - L3 disc level. Dr. Garrels said there was clear documentation of advanced disease years prior to the alleged work injury. (JME .8, p. 82)

The claimant's testimony was credible and the evidence was that claimant was and is a hardworking, loyal, honest and valued employee of the City.

CONCLUSIONS OF LAW

Causation

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).

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[1] Claimant's primary care physician treated claimant's muscle cramping at that time as an adverse reaction to medication. (See. JME 2, pp.19 – 21)

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.

The City relies upon the evidence that claimant was not assigned Bobcat 485 or assigned to work on the street crew for some days in late June. The evidence at hearing was that the equipment logs are not always accurate. More importantly, the claimant has asserted that he was injured on or about June 20, 2017. I find the testimony of claimant, Mr. Carlson and Mr. Lopshire convincing that claimant suffered a work injury while operating Bobcat 485. There may be some dispute as to what specific day it occurred on in late June 2017, but the evidence shows claimant had a worsening and permanent exacerbation of his back condition. As a cumulative injury I find June 26, 2017 is the claimant's date of injury; the date claimant saw Dr. Meyers. The claimant suffered a cumulative trauma to his lower back.

Dr. Garrels speculates that claimant had an acute injury during the 4th of July holiday. There is no credible evidence in the record that claimant had an acute injury to his back over the 4th of July holiday. Dr. Garrels never examined claimant. I find it unlikely that claimant would not inform his treating medical providers, Dr. Meyer, Dr. Armendariz and Dr. Luszczyk that he had an acute injury over the 4th of July holiday if

he had one. Claimant was in very significant pain, was using crutches and a wheelchair and told that he faced possibility of being paralyzed. Dr. Garrels' speculation is not convincing. As the claimant's injury is cumulative Dr. Garrels' reliance on equipment and work assignment logs for a specific day in June 2017 is misplaced to determine whether claimant has a work injury.

Dr. Garrels was "baffled" why claimant had not sought out aggressive treatment earlier. The answer is that Dr. Garrels' analysis of claimant's injury was wrong. Claimant had sporadic back pain over the years that responded to chiropractic treatment. Claimant's cumulative injury of June 26, 2017 was of a different nature and caused permanent impairment.

Dr. Armendariz recorded on July 7, 2017 that there was no specific injury, and claimant reported the physical nature of his job as a possible cause. Dr. Meyer recalled that claimant discussed the physical nature of his job as a possible cause of his back pain. Mr. Lopshire and Mr. Carlson were aware that claimant was complaining of back pain due to operating the Bobcat.

Dr. Luszczyk recorded on July 11, 2017 that claimant reported worsening of back symptoms while recently at work.

The testimony of claimant and his co-workers establish claimant was complaining of significant back pain while operating Bobcat 485. While the exact date his injury occurred is unknown, Mr. Lopshire, Mr. Carlson and claimant knew about his injury between June 20 and June 26, 2017.

I find that the convincing weight of both the testimony and medical evidence is that claimant suffered a cumulative trauma to his lower back on June 26, 2017. I find the convincing weight of the medical opinions is that claimant's work was a substantial factor in aggravating claimant's lower back condition. The aggravation caused the need for claimant's back surgery and treatment.

Notice

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).

As detailed above, claimant notified the City about the fact that he believed his work had caused his back injury within 90 days of his cumulative injury. The City has not proven it did not have timely notice.

Extent of Disability

Claimant has established he has a permanent impairment to the body as a whole; an industrial disability. 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.

Claimant has returned to work for the City and has been operating his regular position as an equipment operator. Claimant and his wife credibly testified that his injury has slowed him down in activities. Claimant has some modest pain, somewhat less flexibility and some numbness in his thighs.

Claimant's treating physician has returned claimant to work without restriction to be an equipment operator for the City. Dr. Bansal is the only physician who has recommended restrictions.

It is unlikely that claimant could return to his work as a general laborer for the City or other work that required frequent heavy lifting. Claimant has been quite motivated to return to work for the City. Claimant 's vocationally relevant employment has been operating equipment for the City's Street Department. Claimant's education is limited and his age is not a positive factor.

I find that due to claimant's June 26, 2017 work injury he has a 15 percent loss of earning capacity. Considering all of the factors of industrial disability I find claimant has a 15 percent industrial disability entitling him to 75 weeks of permanent partial disability.

The parties also dispute the proper commencement date for permanent disability benefits. I found claimant's permanent injury was on June 26, 2019. Claimant returned to work on June 27, 2019. (JE. 4 p. 5) When the claimant returns to work, permanent disability benefits should commence. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). Therefore, I conclude that permanent partial disability benefits should commence in this case on June 27, 2017.

HEALING PERIOD

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The parties stipulated claimant was off work July 12, 2017 through November 13, 2017. Claimant was off work due to the June 26, 2017 work injury. I find that claimant is entitled to healing period benefits from July 12, 2017 through November 13, 2017.

Penalty

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendant did a prompt investigation of the claim. Dr. Garrels reviewed the medical history and the video recordings before issuing his conclusions as to claimant's condition. Defendant contemporaneously conveyed the basis for delay in payment of benefits to claimant. Although I found that claimant's back condition was the result of a work-related injury the defendant had reasonable grounds to deny the claim. No penalty benefits are being awarded.

Medical expenses

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).

Claimant has proven his medical expenses and medical mileage should be reimbursed under Iowa Code section 85.27 and Iowa Code section 89.39. The medical expenses and medical mileage are causally related to his June 26, 2017 work injury. Defendant shall reimburse claimant's out-of-pocket medical expenses of $1,129.18 and medical mileage of $262.19.

Costs

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify

for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Claimant has requested payment for the full cost of Dr. Bansal's IME. The first rating that a physician retained by the defendant was Dr. Abernathey on January 21, 2019. Dr. Bansal examined the claimant on December 7, 2018 and issued the IME on February 5, 2019. Dr. Bansal lists the date of service of his IME as December 7, 2018. As the defendant did not have a rating of impairment before Dr. Bansal's examination claimant has failed to prove entitlement to the full cost of the IME.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be ... (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate ...,

Dr. Bansal did itemize his bill and charged $2,204.00 for the report. I find that the cost of the report is reasonable. For the report portion of his IME, I award $2,204.00 as a cost to the claimant. I also award the cost of Dr. Luszczyk's report in the amount of $310.00. As claimant is limited to two medical reports for reimbursement, I decline to award Dr. Meyer's expense for his report. I award the filing fee and service fee of

$106.67 and deposition costs of $626.60. I decline to order the subpoena cost, as no showing of any necessity of this cost was shown by claimant.

Total costs to the claimant is $3,247.27.

ORDER

Defendant shall pay claimant seventy-five (75) weeks of permanent partial benefits at the weekly rate of five hundred eighty-one and 77/100 dollars ($581.77) commencing on June 27, 2017.

Defendant shall pay claimant healing period benefits from July 12, 2017 through November 13, 2017 at the weekly rate of five hundred eighty-one and 77/100 dollars ($581.77).

Defendant shall pay claimant medical costs of one thousand one hundred twenty-nine and 18/100 dollars ($1,129.18).

Defendant shall pay claimant three thousand two hundred forty-seven and 27/100 dollars ($3,247.27) in costs.

Defendant shall pay claimant medical mileage of two hundred sixty-two and 19/100 dollars ($262.19).

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 22nd day of August, 2019.

JAMES F. ELLIOTT
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.