BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELLE R. BOKEN, Claimant, vs. PEAK INTERESTS, LLC, d/b/a PIZZA HUT PROSERVE CORP., Employer, NATIONWIDE MUTUAL INS. CO., Insurance Carrier, Defendants.	File Nos. 5040834 and 5056052 A P P E A L D E C I S I O N Head Note Nos: 1108; 1804; 2500; 2901; 2805; 2907

Defendants, Peak Interests, LLC d/b/a Pizza Hut Proserve Corporation and Nationwide Mutual Insurance Company, insurer, appeal from a combined review-reopening and arbitration decision filed on November 14, 2017. The case was heard on September 2, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 14, 2016.

Claimant Michelle Boken sustained a work-related injury on January 20, 2010, to her low back, when she slipped and fell on ice. The parties settled that case, File No. 5040834, pursuant to an agreement for settlement. The parties agreed claimant sustained 30 percent industrial disability, which entitled claimant to receive 150 weeks of permanent partial disability (PPD) benefits. The agreement for settlement was approved by this agency on February 25, 2013.

On February 6, 2015, claimant filed for review-reopening in File No 5040834. On January 19, 2016, claimant filed a second petition, File No. 5056052, alleging a new injury date of January 23, 2013. The two petitions were consolidated, and a hearing was held on September 2, 2016.

On November 14, 2017, the deputy workers' compensation commissioner issued a decision, finding claimant had proven by a preponderance of the evidence in File No. 5056052 that she sustained a minor, temporary injury to her low back on January 23, 2013. The deputy commissioner held there was no specific evidence in the record supporting the assertion the January 23, 2013, work injury caused a permanent deterioration in claimant's condition. With respect to the review-reopening action in File No. 5040834, the deputy commissioner found claimant was entitled to review-reopening

against defendants. Based upon a finding of a change in condition, the deputy commissioner found claimant to be permanently and totally disabled. The deputy commissioner also determined defendants were responsible for payment of all medical charges itemized in Exhibits 23 through 27. The deputy commissioner ordered defendants to pay claimant's costs.

On appeal, defendants assert the deputy commissioner erred in File No. 5056052 in finding claimant sustained a work-related injury on January 23, 2013. In File No. 5040834, defendants assert the deputy commissioner erred in finding claimant satisfied her burden of proof with respect to a change in condition for purposes of review-reopening. Further, defendants assert the deputy commissioner erred in finding claimant is permanently and totally disabled. Lastly, defendants assert claimant's fusion surgery was not reasonable and necessary care.

Claimant asserts the arbitration/review-reopening decision should be affirmed in its entirety.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the proposed arbitration/review-reopening decision filed on November 14, 2017, is affirmed in part, modified in part, and reversed in part.

In File No. 5056052, I affirm and adopt the deputy commissioner's finding that claimant sustained an injury to her low back on January 23, 2013. However, I respectfully disagree with the deputy commissioner's determination that the January 23, 2013, injury was temporary in nature.

In File No. 5040834, I respectfully disagree with the deputy commissioner's finding that claimant met the legal requirements to reopen the January 20, 2010, injury.

I affirm and adopt the deputy commissioner's finding that claimant is entitled to permanent total disability benefits; however, I attribute that entitlement to the January 23, 2013, date of injury.

I affirm and adopt the deputy commissioner's finding that the fusion surgery performed by Dr. Jensen was reasonable and necessary care.

I affirm and adopt the deputy commissioner's finding that defendants are responsible for the medical expenses itemized in Exhibits 23 through 27.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. While I performed a de novo review, I give considerable deference to findings of fact which are

impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing.

FINDINGS OF FACT

I adopt the deputy commissioner's findings of fact from pages two through eight of the arbitration decision in their entirety, with the following additional analysis:

On February 25, 2013, this agency approved an agreement for settlement between the parties in File No. 5040834. The parties agreed claimant sustained an injury to her lumbar spine, which arose out of and in the course of her employment on January 20, 2010. (See Exhibit 1) That injury was also the subject of a third-party lawsuit. (See generally Ex. 2, Ex. 3)

Claimant sustained the January 20, 2010, low back injury when she slipped and fell on ice while delivering a bank deposit for defendant-employer. (Ex. 1, p. 1) When conservative treatment failed to improve claimant's condition, Dr. Eric Phillips, neurosurgeon, performed an artificial disc replacement surgery at the L4-5 and L5-S1 levels of claimant's lumbar spine on June 18, 2010. (See Ex. 4, p. 13; Ex. 7, p. 12) The use of artificial discs at multiple levels was considered "off label" in the United States. (Ex. 7, p. 11) Dr. Phillips provided claimant with an impairment rating of eleven percent of the whole person. Dr. Phillips assigned a permanent lifting restriction of 25 pounds. (See Ex. 1, p. 15) Vocational expert Stephen Schill opined claimant sustained an industrial loss between 48 and 56 percent. (Ex. 1, pp. 11-12)

Subsequent to the artificial disc replacement surgery, claimant returned to work for defendant-employer. Claimant resumed her role as restaurant general manager. (Ex. F, depo tr. pp. 11-12) According to claimant, she limited her work activities in keeping with her permanent restrictions; however, she did not miss any time due to her condition. (Ex. F, depo tr. p. 12) Between November 2010 and January 2013, claimant presented for evaluation of her low back on only two occasions. Both appointments were scheduled by Dr. Phillips as annual post-operation check-ups. The records for those evaluations do not indicate a worsening of claimant's condition. (Ex. 7, pp. 22-24; See Ex. 4, p. 15) In fact, claimant reported improvement levels up to "110 percent." (Ex. 1, p. 19)

On or about January 23, 2013, in the course of performing her normal work activities, claimant sustained what she believed to be a new injury to her lumbar spine. (Ex. G, depo tr. p. 5-6) She felt a pull and a pop in her low back while moving some shelving around to make room for a new computer system. (Ex. G, depo tr. p. 9) There is no indication in the evidentiary record as to how much the shelving weighed. Claimant testified she immediately felt the need to check with Dr. Phillips to see if anything had happened to the artificial discs. (Ex. G, depo tr. pp. 7-9) Claimant testified she told her boss about the incident shortly after it occurred. (Ex. G, depo tr. p. 9) She believes she left work early as a result of the injury. (Ex. G, depo tr. p. 10)

The January 23, 2013, injury was at the center of the review-reopening and arbitration hearing that occurred on September 2, 2016. Regardless of whether claimant's condition relates back to the original date of injury or the January 23, 2013, injury, claimant asserts she is permanently and totally disabled.

Defendants assert two main arguments. Defendants seemingly acknowledge a worsening of claimant's condition; however, they believe the deterioration of claimant's condition was caused by her smoking or by an unrelated, intervening injury. Alternatively, defendants assert claimant's change in condition occurred prior to the February 25, 2013, agreement for settlement, and, as a result, her condition on February 25, 2013, should form the baseline for the review-reopening petition as opposed to the condition outlined in the agreement for settlement documents signed by the parties and approved by this agency.

I affirm the deputy commissioner's finding that claimant sustained a new injury on January 23, 2013.

Defendants first argue the medical evidence supports a finding that an unrelated intervening incident and/or claimant's continued smoking caused claimant's back condition to worsen in January 2013. The first half of defendants' argument hinges on a chiropractic record from January 24, 2013. Specifically, in the "notes" section of the handwritten chiropractic record, Dr. Nicole Ball wrote, "pt. reports having employee walk on her back to "pop" it." (Ex. E, p. 7) No additional analysis is provided in the record. The deputy commissioner correctly dismissed this medical record because the context of the note is entirely unclear.

Defendants further assert claimant's condition is causally related to her long-standing history of smoking. Defendants also assert claimant had a duty to quit smoking in order to mitigate her damages. It is undisputed that several doctors recommended claimant discontinue smoking as it interferes with the healing process. Such a recommendation infers there was some action claimant could have taken to mitigate her damages; however, no medical provider required claimant to quit smoking, or provided her with the means to do so. There is no evidence in the evidentiary record that claimant's smoking was a substantial contributing factor or the proximate cause of claimant's aggravated condition.

Defendants assert claimant's testimony regarding the January 23, 2013, date of injury is inconsistent and unreliable. I disagree.

Claimant consistently and credibly testified she suffered a second injury to her low back on January 23, 2013. I acknowledge claimant did not describe the shelving incident until her March 4, 2013, appointment with Dr. Phillips; however, it cannot be said claimant's omissions were deceitful. The timeline clearly establishes that an injury occurred on or about January 23, 2013. The timeline further establishes claimant believed the injurious event occurred at work.

Claimant consistently described an acute injury that progressively worsened over a short period of time. Claimant's testimony regarding the January 23, 2013, injury is in line with the timeline of events. I agree with the deputy commissioner's analysis that claimant initially believed she was experiencing a temporary flare-up of her condition. The gradual increase in pain claimant experienced, coupled with the seemingly normal work activities she was performing on the date of injury explains the initial inconsistencies in the medical records.

At her deposition, Claimant testified she immediately called her doctor and chiropractor following the work injury in fear she had re-injured her low back. (Ex. G, depo tr. p. 6) This is supported by the medical records in evidence. Claimant presented to her chiropractor on January 24, 2013; one day after the date of injury. (See Ex. E, p. 6) Medical records from Nebraska Spine Center reveal claimant called in to speak with Dr. Phillips on January 28, 2013, to discuss increased low back pain, as well as pain in her hips and right lower extremity. (Ex. A, p. 1) Claimant presented to Atlantic Medical Center on January 31, 2013. Although a specific injury is not described, the Atlantic Medical Center nevertheless filled out a work-related injury report and referred claimant to her authorized treating surgeon, Dr. Phillips. (Ex. B, pp. 1-3) The appointment with Dr. Phillips occurred on February 4, 2013. Claimant described presenting to work on or about January 23, 2013, and experiencing increasing low back pain that worsened throughout the day. (Ex. 7, p. 25) Likewise, Dr. Berry's February 11, 2013, medical record describes an acute attack on top of prior chronic back pain with an accompanying note that the current episode began on January 23, 2013. (Ex. 8, p. 3)

Claimant eventually provided more context to the January 23, 2013, date of injury. On March 4, 2013, claimant described to Dr. Phillips the same injury she later described during her deposition and at hearing. (Ex. 7, p. 34) On April 11, 2013, claimant described the same injury to physical therapist Ryan Legg. (Ex. 11, p. 1) On April 15, 2013, she relayed her belief to Ric Jensen, M.D., neurosurgeon, that she may have aggravated her low back as recently as January 23, 2013. (Ex. 6, p. 5)

Claimant testified she notified Tim Peterson, her area manager, of the injury sometime during the afternoon of January 23, 2013. (Ex. G, depo tr. p. 9) She further testified to her belief she left work early on the date in question due to pain. (Ex. G, depo tr. p. 10) At hearing, claimant testified she told Mr. Peterson she injured herself while moving shelving. (Tr., p. 69) Mr. Peterson was present at the arbitration hearing. He was not called to rebut claimant's testimony.

Substantial evidence exists to support the finding that claimant sustained an injury on January 23, 2013, which arose out of and in the course of her employment with defendant-employer.

Having found claimant sustained an injury that arose out of and in the course of her employment on January 23, 2013, it must be determined whether her ongoing complaints and the need for additional surgical intervention arose out of the original

2010 injury or the 2013 injury. The deputy commissioner found the January 23, 2013, injury to be temporary in nature. I respectfully disagree.

Review of the medical records establishes there is virtually no evidence claimant experienced significant ongoing or progressive low back symptoms following the initial surgery performed by Dr. Phillips on June 18, 2010, prior to the January 2013 incident. Rather, there is clear and distinct evidence that claimant's condition drastically changed on January 23, 2013.

After undergoing surgery on June 18, 2010, claimant was released from treatment by Dr. Phillips in November 2010 with no specific treatment recommendations. (Ex. 7, p. 21) Claimant returned to her full-time position with the defendant-employer in November 2010. (See Ex. F, depo tr. pp. 11-12) Claimant was engaged in her regular job, with few accommodations, between November 2010 and January 2013. She was considered to be in good standing as a restaurant manager for defendant-employer. (Ex. 1, p. 4) She did not actively treat for her low back condition between November 2010 and January 2013; she only presented at two medical appointments during this time period for routine, annual check-ups with Dr. Phillips. She did not complain of significant or increasing pain at those two appointments. (Ex. 1, pp. 15-17) Dr. Phillips was not recommending claimant undergo any additional surgery. It cannot be said claimant's condition gradually worsened between November 2010 and January 2013 to a point where she could no longer deal with the pain.

Claimant has consistently asserted her condition dramatically changed following the January 23, 2013, date of injury. (See Ex. G, depo tr. p. 10; See also Hearing Transcript, pp. 57-58) While claimant was never pain-free following the 2010 surgery, there was a significant difference in her condition when comparing the time periods of November 2010 through January 2013, and then from January 23, 2013, forward.

The medical record as a whole supports this conclusion. Claimant told Dr. Gammel there was a dramatic difference in her pain between January 22, 2013, and January 23, 2013. (Ex. 4, pp. 38-39) His report provides, "On the 22nd she would have rated her pain 3/10; on the 23rd it was 9/10 and graduated to 9-10/10 within a few days." (Ex. 4, p. 38) Claimant also described a similar progression to her physical therapist, Ryan Legg, on April 11, 2013, "Since the disc replacement, she reports she has been doing pretty good until she had to move that shelving." (Ex. 11, p. 1) On June 5, 2013, claimant told Jennifer Chavez, PA-C that she did not have pain until she was at work on the day reported." (Ex. A, p. 23) Similarly, on July 8, 2013, Dr. Berry's report provides, "She was on the job again this winter, at Pizza Hut, and was moving some shelving when she felt something happen and she was never able to walk normally after that." (Ex. B, p. 8)

The substantial weight of the evidence supports the finding that the pain experienced by claimant following the January 23, 2013, injury did not return to baseline. The substantial weight of the evidence supports the finding that claimant

permanently and materially aggravated her pre-existing low back condition on January 23, 2013.

One of the more challenging aspects of this claim is the lack of definitive diagnostic imaging; specifically, the MRI reports. Due to the artificial discs, the MRI films were "effectively obliterated" and "distorted" at L4-5 and L5-S1. (Ex. A, p. 6) As a result, the expert physicians in the evidentiary record were limited to interpreting x-rays, CT scans, and bone scans to diagnose claimant's condition at those levels.

The radiographs obtained on August 18, 2011, revealed the spinal implants were in satisfactory position, good spinal alignment, no evidence of subsidence, slight tendency towards listhesis at L4-5 in flexed position. (See Ex. 4, p. 15) The radiographs obtained on August 20, 2012, revealed similar findings, with plane angulation at L4-5 to the right, anterior translation at L4-5 in flexed position reducing fully in extended position, annular motion occurring at L5-S1; no evidence of substantial subsidence, adjacent level held up well at L3-4 and L2-3. (Ex. 7, p. 23)

Radiographs of the sacrum obtained on January 31, 2013, revealed post-operative changes at L4-5 and L5-S1; and mild bilateral sacroiliac arthritis with mild sclerosis. Lumbar radiographs obtained on the same date revealed post-operative changes at L4-5 and L5-S1 without gross complicating features; facet arthritis L3 through S1; and mild degenerative changes of the upper spine. (Ex. C, pp. 1-2)

The neuroradiologist who conducted and interpreted claimant's initial MRI, dated March 4, 2013, noted that the imaging, although obliterated at L4-5 and L5-S1, suggested degenerative hypertrophy of the L4-5 facets. (Ex. A, p. 6) Dr. Phillips and Dr. Jensen reached significantly different conclusions with respect to the diagnostic imaging studies conducted on claimant's lumbar spine. (See Ex. A, p. 25; Ex. 6, pp. 5-6) Dr. Phillips opined the medial branch blocks, bone scan, CT scan, and MRI reports were negative for artificial disc problems. (Ex. A, p. 25) Dr. Jensen, on the other hand, provided a thorough analysis of claimant's diagnostic imaging in both his April 23, 2013, and September 18, 2013, reports. (Ex. 6, pp. 5-10) Dr. Jensen opined discogenic pathology was present above the level of the artificial disc replacements, including the potential existence of an annular disc wall tear at the L2-3 lumbar segment, without significant discogenic disease at L3-4. He opined the CT scan indicated moderate grade facet arthropathy at L4-5, and facet tropism/asymmetry within the L5-S1 lumbosacral junctional facet joints. Dr. Jensen explained this combination would tend to indicate the possibility for adverse, biomechanical stress in the lumbar facet joints. (Ex. 6, p. 6) Dr. Jensen's opinions were strengthened and reinforced through his persuasive deposition testimony. (See Ex. 2, pp. 12, 14-17, depo tr. pp. 45, 55-68)

Defendants argue the deputy erred in affording the opinions of Dr. Jensen and Dr. Gammel greater weight than those of Dr. Phillips.

Defendants put forth three main arguments; (1) defendants assert Dr. Phillips' opinions should be afforded more weight than Dr. Jensen because his ultimate

conclusion – that claimant's condition was related to smoking rather than the artificial disc replacements – is in line with their overall position on appeal; (2) Dr. Phillips treated claimant for a number of years and conducted a thorough workup of claimant that included obtaining diagnostic imaging, conducting blood tests, and discussing claimant's case with other partners in his office; and (3) Dr. Phillips opined a second surgery was not warranted, and he correctly predicted a second surgery would not be successful.

Defendants' arguments are largely unconvincing. First, Dr. Phillips offers no support to bolster his opinion that smoking caused the deterioration in claimant's condition. He also offers no explanation with respect to how or why the deterioration presumably caused by smoking suddenly became symptomatic on or about January 23, 2013.

The assertion that Dr. Phillips conducted a thorough workup of claimant in 2013 is disingenuous. Claimant's treatment with Dr. Phillips abruptly stopped shortly after it resumed in June 2013. (Ex. 7, p. 38) To Dr. Phillips' credit, at his final evaluation with claimant, he did provide that if the technetium bone scan returned negative, claimant would need to be evaluated elsewhere as he would have nothing further to offer her. (Ex. 7, p. 37) However, instead of following up with claimant subsequent to the bone scan and referring her to another specialist or on to pain management, Dr. Phillips conducted a conference with the nurse case manager out of the presence of claimant, he determined the condition was not work-related, and he released claimant from his care.

Dr. Phillips' final chart entry, dated June 4, 2013, focuses on the annular tear at L2-3, a small central protrusion at L1-2, and deteriorated discs in claimant's upper back. In doing so, he implies these areas are what was causing claimant's ongoing pain; "I would be willing to see her through her general health insurance to evaluate and treat these discs." (Ex. 6, p. 38) This opinion is concerning for a number of reasons. First, it represents an abrupt departure from the area previously felt to be the source of claimant's pain. It is well documented in Dr. Phillips' notes that claimant's pain was stemming exclusively from the lumbosacral region, not the upper lumbar or upper back. (See Ex. A, p.11; "... this is not where she is hurting. She is exquisitely tender over the spinous process of L5 and the sacrum.") Dr. Phillips called claimant's situation an "enigma;" yet, two weeks later, Dr. Phillips discontinued claimant's treatment, seemingly confident in his opinion that claimant's problem was in the upper lumbar region. It is worth noting a subsequent lumbar discogram did not produce concordant pain within the upper lumbar disc segments. (Ex. 6, pp. 9-10) Second, Dr. Phillips appears reserved to the possibility that a new, work-related injury occurred on January 23, 2013. Despite consistently noting the alleged January 23, 2013, injury, Dr. Phillips never addresses the possibility of an aggravation.

Defendants also assert Dr. Phillips' opinions should be afforded more weight than Dr. Jensen's because Dr. Jensen's opinions were based on an inaccurate history. While I ultimately afford the medical opinions of Dr. Jensen more weight than those of

Dr. Phillips, I acknowledge there are several issues with Dr. Jensen's opinions as they relate to causation. Dr. Jensen possessed little to no knowledge of the intervening January 23, 2013, injury outside of the fact an apparent exacerbation occurred on the date in question. He admittedly had no knowledge of the events that transpired on January 23, 2013. (See Ex. 2, pp. 23-24, depo tr. pp. 91-93) Moreover, Dr. Jensen operated under the mistaken belief that the original surgical intervention only provided claimant relief for six months. As previously stated, the evidentiary record as a whole reveals claimant was working full-time, with minimal ongoing complaints, and virtually no ongoing treatment between November 2010 and January 2013. For these reasons, little weight is afforded to Dr. Jensen's ultimate conclusion claimant's condition is related to the January 20, 2010, date of injury.

This finding does not exclude consideration of Dr. Jensen's opinions regarding the condition of claimant's lumbar spine, the challenges posed by implanting two artificial discs in the lumbar spine, or the reasonableness of the care he ultimately provided. When claimant's symptoms began, and whether an injury occurred on January 23, 2013, is immaterial to Dr. Jensen's opinions regarding the above.

It is worth noting Dr. Jensen was not rigid in his analysis or fundamentally opposed to amending his opinion with new information. When asked to assume the information pertaining to the January 23, 2013, injury was accurate, and that the claimant had been essentially symptom-free between November 2010 and January 2013, Dr. Jensen agreed that the fusion surgery he performed would more likely than not have been necessitated by the subsequent January 23, 2013, workplace injury, not the original injury in January 2010. (Ex. 2, p. 24, depo tr. pp. 93-95). In addition, Dr. Jensen testified the original injury and surgical intervention administered by Dr. Phillips in 2010 could have made claimant susceptible to future pain and/or damage to the spinal column. (Ex. 2, p. 11, depo tr. p. 41).

I find the opinions of D.M. Gammel, M.D., represent the best expert medical evidence in the record. Dr. Gammel is the only expert in the evidentiary record to conduct a comprehensive evaluation. Dr. Gammel also benefits from being the only expert in the evidentiary record completely detached from the third-party litigation associated with the first date of injury. In this respect, he had the best opportunity to objectively assess the medical record. In addition to being the only expert to conduct a comprehensive evaluation of claimant, Dr. Gammel was able to examine claimant in March 2016, six months prior to the date of hearing. In contrast, Dr. Phillips last examined claimant in June 2013, three years prior to the date of hearing.

Defendants argue the November 14, 2013 fusion surgery was not reasonable and necessary. Their argument is rooted in hindsight analysis. Defendants broadly assert Dr. Phillips opined further surgical intervention would not be successful in addressing Claimant's complaints. This is misleading. Dr. Phillips opined the annular tear revealed by MRI imaging at L1-L2 was not something that his office typically operated on. According to the evidentiary record, Dr. Phillips did not address Dr. Jensen's surgical recommendations at all in 2013. Dr. Phillips' opinion that further

surgical intervention "was not indicated, nor would it likely be of benefit" was not provided until April 28, 2015. (Ex. A, pp. 24-25). Defendants' hindsight analysis is not persuasive.

Dr. Jensen opined the fusion surgery was a realistic option as a salvage procedure for the management of claimant's pain. (Ex. 2, pp. 16-17, depo tr. pp. 64, 68) The surgery was an attempt to recover pain control and eliminate muscle fatigue in the paraspinal musculature. Admittedly, Dr. Jensen explained the fusion procedure does not have an extremely high success rate; however, it is the procedure of choice in these circumstances. (Ex. 2, p. 18, depo tr. pp. 69-70) I find the fusion surgery was reasonable and necessary medical treatment.

Lastly, defendants assert the deputy commissioner erred in finding claimant permanently and totally disabled. Defendants put forth two arguments to support their assertion. First, defendants argue there is no evidence in the record to support the deputy commissioner's finding claimant was terminated because the injury was not work-related and it had no responsibility to accommodate claimant's restrictions. Second, defendants argue claimant lacks motivation.

The first argument deserves little discussion as it is essentially a red herring. The defendant employer's ability to return a claimant to work in any capacity is but one factor in assessing an injured worker's earning capacity. Moreover, the deputy commissioner's speculation has merit, and is at the very least tangentially supported by the evidentiary record. The timing of claimant's termination supports the deputy commissioner's speculation. Claimant was terminated on June 20, 2013, 16 days after Dr. Phillips provided his opinion claimant's condition was not work-related, and one day after the date of defendant-insurer's Auxier letter.

Conversely, defendants assert two alternative reasons as to why claimant was terminated, but point to no supporting documentation in the evidentiary record. Defendants' assertion that claimant was terminated pursuant to a 90-day policy is without merit. The evidentiary record reveals claimant last worked in April 2013. Even if we assume claimant's last day was April 1, 2013, the 90-day window would close on June 30, 2013, not June 20, 2013. Likewise, defendants' assertion that claimant was terminated for a disciplinary action from over a year prior to her date of termination is not convincing.

Claimant credibly testified to the discussion she had with Mr. Peterson on the date of her termination. Defendants had the opportunity, but ultimately did not call Mr. Peterson to rebut claimant's testimony regarding the contents of that discussion.

Regardless, after speculating on the reason for claimant's termination, the deputy commissioner qualified his opinion, "In any event, I find there were no reasonable accommodations which could have kept the claimant employed during this timeframe." In this instance, the fact claimant could not return to work for the defendant-employer is

exponentially more important in determining claimant's earning capacity than why she was terminated.

Defendants assert claimant is not entitled to permanent total disability benefits because she lacks motivation to return to the competitive labor market.

Claimant has not worked since April 2013. Claimant has made no attempt to return to work since January 2014. She has made no attempt to determine whether she could perform at the physical levels outlined in the valid November 2014 FCE. To make a finding of permanent total disability, it is helpful for this agency to have evidence that a claimant has made an actual, good faith work search. Outside of a single application, claimant in this case did not perform a legitimate work search. She believed such attempts would be futile.

As is the case in this matter, an injured worker can still prove permanent total disability if they introduce other substantial evidence that he or she has no reasonable prospect of steady employment. Dr. Phillips, Dr. Jensen, and Dr. Berry all agree claimant cannot return to work based on her pain complaints. (See Ex. 7, p. 38; Ex. 6, p. 29; Ex. 8, p. 1) The most optimistic opinion regarding claimant's employability comes from Dr. Jensen's deposition testimony. He testified claimant is capable of some form of sedentary work as long as she has the ability to arise and mobilize at will or intermittently. He further testified it remains of some concern whether claimant has the capacity to work an eight-hour shift. (Ex. 2, p. 21, depo tr. pp. 83-84)

There is only one vocational assessment in the evidentiary record. The vocational expert, Stephen Schill, MS, CRC was in the unique position of being able to assess claimant's vocational abilities after both the 2010 and 2013 injuries. He found claimant to be 100 percent precluded from any competitive employment following the 2013 injury. Defendants did not produce a rebuttal opinion or any other evidence to establish suitable employment opportunities exist for claimant within the competitive labor market.

Having considered the medical evidence, claimant's testimony on this issue, and the record as a whole in this case, I agree with the deputy commissioner's finding that claimant is permanently and totally disabled.

CONCLUSIONS OF LAW

File No. 5056052:

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 Elec. 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.

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). The aggravation must be more than "slight" to constitute an injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

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).

Based on the opinions of Dr. Gammel and Dr. Jensen, I find claimant sustained a new injury on January 23, 2013, which permanently and materially aggravated her pre-existing low back condition. The deputy commissioner's finding that the January 23, 2013, injury was minor, or temporary in nature is reversed.

The standard that must be met to establish two separate work-related injuries requires a claimant to demonstrate a distinct and discrete "disability attributable to ... work activities" that occurs after an initial injury. Ellingson, 599 N.W.2d at 444. It is not enough for the worker to show disability has been increased by subsequent work activities. Id. These circumstances may serve to increase the disability attributable to the first injury, but do not establish a separate and discrete disability. Id. To establish a separate injury claim, the subsequent condition of the claimant must not be a consequence of the first injury. Excel Corp. v. Smithart, 654 N.W. 2d 891 (Iowa 2002).

The court in Smithart explains:

> If a claimant establishes the existence of an initial disability based on an injury to the lower back resulting in the imposition of a lifting restriction, the mere subsequent imposition of a greater lifting restriction could indicate either a separate and discrete injury or an increase in the disability caused by aggravating work activities.

(Id. At 900)

In Smithart, the worker sustained a number of injuries to his back while lifting boxes for the defendant employer. After a 1995 injury, he returned to work with a 50-pound lifting restriction. After a 1997 lifting injury with the same employer, he returned to work with a 25-pound injury. The claimant in Smithart asserted separate injuries, as opposed to one cumulative injury. The only evidence of a separate and discrete injury was the report made by Smithart that his back became sore after lifting boxes on May 6, 1997, and that his lifting restriction was subsequently changed from fifty pounds to twenty-five pounds. The Supreme Court determined substantial evidence did not exist to support a finding of two separate and discrete disabilities. The Court held evidence of increased lifting restrictions alone is insufficient to find a separate and distinct injury. As such, it was determined the claimant failed to sustain his burden of establishing a separate and discrete injury following the initial injury.

Conversely, in this case, substantial evidence does exist to support a finding of two separate and discrete disabilities. Claimant's condition drastically changed following the January 23, 2013, date of injury. Claimant's pain complaints increased significantly and did not return to baseline. She exhibited a very distressed gait pattern following the January 23, 2013, date of injury. After not presenting for treatment on her low back in over two years, claimant returned to Dr. Phillips, Dr. Jensen, Dr. Berry, and her chiropractor, Dr. Ball. The conservative treatment consisted of pain medications, increased lifting restrictions, diagnostic testing, and injections. When conservative treatment failed to alleviate the increase in symptoms, Dr. Jensen performed a fusion

surgery. Based on Smithart, claimant in this case has met her burden of proving a separate and discrete disability. Claimant's condition is found to have arisen out of the January 23, 2013, date of injury.

I affirm the deputy commissioner's finding claimant is entitled to permanent total disability benefits as a result of the work injury. However, I find the disability is causally related to the January 23, 2013, date of injury, not the January 20, 2010, injury. Following a causation opinion and increased restrictions from Dr. Phillips, defendant-employer terminated claimant's employment. Claimant underwent an updated FCE which placed claimant in the sedentary demand category. She has applied for, and received, Social Security Disability benefits. Lastly, the only vocational assessment in the evidentiary record determined claimant is totally disabled.

The parties stipulated to a higher weekly benefit rate for the January 23, 2013, date of injury. As such, claimant is entitled to receive permanent total disability benefits at the stipulated weekly rate of $484.01 from the date claimant last worked in April 2013, into the future throughout the time she remains permanently and totally disabled.

For the reasons outlined and discussed in the statement of facts, I affirm the deputy commissioner's finding that defendants are responsible for the reasonable and necessary medical expenses associated with this claim, and likewise find the medical treatment provided by Dr. Jensen, including the fusion surgery, was reasonable and necessary.

File No. 5040834:

Having found claimant sustained a new injury on January 23, 2013, which permanently and materially aggravated her pre-existing condition, I reverse the deputy commissioner's finding that claimant carried her burden of proof that she sustained a worsening of her physical and/or economic condition which entitles her to review-reopening of the agreement for settlement approved by this agency on February 25, 2013.

ORDER

IT IS THEREFORE ORDERED that the combined review-reopening and arbitration decision filed on November 14, 2017, is reversed in part, and modified in part.

File No. 5040834 – Review-Reopening - Date of Injury: January 20, 2010:

Claimant shall take nothing further from these proceedings.

Each party shall pay their own costs of the review-reopening proceeding.

File No. 5056052 – Arbitration - Date of Injury: January 23, 2013:

Defendants shall pay claimant permanent total disability benefits at the stipulated weekly rate of four hundred eighty-four and 01/100 dollars ($484.01) from the date claimant last worked in April 2013, and into the future throughout the time claimant remains permanently and totally disabled.

Defendants shall receive a credit for all benefits previously paid.

Defendants 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).

Defendants shall pay, reimburse, and otherwise hold claimant harmless for the medical expenses itemized in Exhibits 23 through 27.

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

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

Signed and filed on this 29th day of April, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Edward F. Noethe
Attorney at Law
20 North 16TH St.
Council Bluffs, IA 51503
enoethe@mcginnlawfirm.com

Jane V. Lorentzen
Attorney at Law
2700 Grand Ave., St. 111
Des Moines, IA 50312
jlorentz@hhlawpc.com