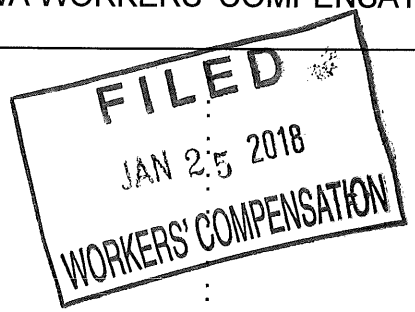
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



VANCE NUNEMAKER, Claimant, vs. GENERAL MILLS, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5057384 ARBITRATION DECISION Headnotes: 1402.40, 1802, 1803, 2501

Claimant Vance Nunemaker filed a petition in arbitration on September 30, 2016, alleging he sustained an injury to his right knee and back while working for the defendant, General Mills on January 5, 2014. General Mills, and its insurer, the defendant, Liberty Mutual Insurance Company ("Liberty Mutual"), filed an answer on November 2, 2016.

An arbitration hearing was held on October 2, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Robert Legislador represented Nunemaker. Nunemaker appeared and testified. Attorney Peter Thill represented General Mills and Liberty Mutual. Brian White, Ted Smith, and Brian McKillip testified on behalf of General Mills and Liberty Mutual. Joint Exhibits ("JE") 1 through 9, Exhibits 1 through 9, and Exhibits A through I were admitted into the record. The record was held open through November 13, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. General Mills and Liberty Mutual waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between General Mills and Nunemaker at the time of the alleged injury.

2. Nunemaker sustained an injury on January 5, 2014, which arose out of and in the course of his employment with General Mills.

3. Nunemaker sustained an injury to his right knee, which is a cause of permanent disability.

4. Although entitlement to temporary benefits cannot be stipulated to, Nunemaker was off work from May 28, 2015 through September 3, 2015.

5. At the time of the alleged injury Nunemaker's gross earnings were $1,490.83 per week, he was married and entitled to six exemptions, and the parties believe his weekly rate is $943.95.

6. Prior to the hearing Nunemaker was paid 10 and 3/7 weeks of compensation at the rate of $1,019.90 per week, and he was paid $10,624.48 in permanent partial disability benefits.

7. General Mills and Liberty Mutual are entitled to a credit for payment of sick pay/disability income in the amount of $9,364.21.

8. Costs have been paid.

9. Nunemaker is entitled to recover the cost of an independent medical examination.

ISSUES

1. What is the nature of the injury?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is Nunemaker entitled to temporary benefits from May 28, 2015 through September 3, 2015?

4. Did Nunemaker sustain a permanent impairment to his back?

5. If Nunemaker has sustained a permanent impairment, what is the extent of disability?

6. What is the commencement date for permanent partial disability benefits?

7. Is Nunemaker entitled to recover medical expenses?

8. Should costs be assessed against either party?

FINDINGS OF FACT

Nunemaker is married with six children, and he lives in Ely, Iowa. (Exhibits 4, pages 15-16; 7, p. 25; Transcript, pp. 6-7) Nunemaker graduated from LaSalle High School in Cedar Rapids in 1980. (Exs. 4, p. 16; 7, p. 16; Tr., p. 7) Nunemaker did not receive any additional education beyond high school. (Ex. 7, p. 16; Tr., p. 7) At the time of the hearing he was fifty-five. (Tr., p. 6)

Nunemaker performed maintenance and custodial work for John Zachar Realtors from 1972 through 1980. (Ex. 4, p. 16; Tr., p. 11) After graduating from high school, Nunemaker accepted a position with Amana Refrigeration. (Ex. 4, p. 16; Tr., p. 7) Nunemaker worked for Amana Refrigeration from 1980 through 1981, as an assembler first class, until he was laid off, and from 1983 through 1990, as a machine operator, assembler first class, and group leader, until he was laid off again. (Ex. 4, p. 16) Nunemaker worked on microwaves, assembling refrigerators, and in injection molding where he would have to lift objects weighing between forty and seventy pounds. (Tr., pp. 8-9)

Following his first layoff from Amana Refrigeration, Nunemaker worked for Iowa Glass Depot in the warehouse from 1981 through 1983. (Ex. 4, p. 16; Tr., p. 10) Nunemaker loaded trucks with windshields and glass, boxed glass, and shipped glass, lifting glass weighing between thirty and ninety pounds. (Tr., p. 10)

Nunemaker returned to Amana Refrigeration, and in approximately 1985, while working for Amana Refrigeration Nunemaker strained his low back while lifting a refrigerator liner, and he received treatment from company physicians in Amana, Iowa. (Ex. 4, p. 17; Tr., pp. 11-12) Nunemaker reported he fully recovered and the injury did not cause a permanent impairment. (Ex. 4, p. 17)

General Mills hired Nunemaker in 1990. (Ex. 4, p. 16; Tr., p. 13) Nunemaker underwent and passed a physical examination as part of the hiring process. (Ex. 4, p. 17; Tr., pp. 13-14) Nunemaker has worked as a cereal packaging operator, dessert process operator, and CI/Training Coordinator for General Mills. (Ex. 4, p. 16)

While working in cereal packaging for the first six months of his employment, Nunemaker would lift thirty to forty pounds, and pull up to 100 pounds. (Tr., pp. 15-16) Nunemaker moved to desserts where he worked for ten years, processing frosting, popcorn, and imitation bacon. (Tr., pp. 17-18) Nunemaker worked with fifty pound bags of products, barrels weighing 100 pounds, and fifty-five gallon drums containing product weighing 400 to 500 pounds. (Tr., pp. 17-18)

In the early 1990s, Nunemaker sought chiropractic treatment for occasional neck and upper back stiffness. (Ex. 4, p. 17)

Nunemaker moved to a total productive manufacturing ("TPM") position after working in desserts for ten years where he was involved with continuous quality

improvement for General Mills. (Tr., pp. 19-20) Nunemaker was responsible for training people from other General Mills locations on desserts and material handling, problem solving and risk management, and he cleaned and maintained equipment. (Tr., pp. 21-22) Nunemaker assisted with setting up training meetings, where he would assemble binders, move tables and chairs, and take down walls in the training center. (Tr., pp. 24-25) Nunemaker also provided plant tours. (Tr., p. 25)

On December 29, 2011, Nunemaker attended an appointment with Christianson Chiropractic, complaining of recent lower back pain and some neck pain, and reporting the pain was exacerbated by bending over. (JE 1, pp. 1-4) Nunemaker attended an appointment on July 16, 2013, complaining of "cervical soreness." (JE 1, p. 5)

On January 5, 2014, Nunemaker's supervisor, Brian White, asked him to set up a room for a team leader forum in the morning. (Tr., p. 26) Nunemaker went to the training center that evening by himself and moved the tables and chairs, and he took down sections of a moveable wall. (Tr., p. 27) The last section of the wall which contains a pass-through door was damaged and it did not roll easily. (Tr., pp. 27-28) Nunemaker reported, "the only way to get the wall from one end of the room to the other end of the room was by pushing the bottom of the wall out so it wouldn't be dragging on the floor and then slide it down to the other end of the room. And then once you got down there, you had to push the wall and fold it against the drag of the dams and then tuck it into the pocket at the end of the room." (Tr., p. 28) As he was pushing and twisting trying to fold and tuck the wall, Nunemaker reported "something popped in my knee." (Tr., p. 28) Nunemaker finished setting up the room, and reported the incident to White the next day. (Tr., p. 28) Nunemaker testified White asked him what he wanted to do, and Nunemaker relayed he could still function, but he could not bend it very far without feeling substantial pain on the inside of his knee. (Tr., p. 29) Nunemaker continued to work. (Tr., p. 29)

Nunemaker completed a work injury report on January 15, 2014, noting "I was taking the wall down for a TL Forum meeting w/Lokar and the last section of the wall (with the door in it) is very hard to move. Strained my knee while pushing wall." (Ex. B, p. 2)

Nunemaker's knee continued to be sore, he could not bend down, and he asked to see the company doctor. (Tr., pp. 29-30) Nunemaker spoke with White, and the safety manager, Pat Killean. (Tr., p. 30) General Mills sent Nunemaker to be examined at Mercy Medical Center on March 17, 2014. (JE 2, p. 8) Medical staff documented Nunemaker reported he had right knee medial pain for two months, after twisting it while pushing a cart. (JE 2, p. 8) Coby Sornsen, ARNP, examined Nunemaker, and assessed him with right knee pain and hypertension, and ordered him to rest, ice his knee, and prescribed a right knee sleeve and medication. (JE 2, p. 8) Sornsen offered a referral to orthopedics, which Nunemaker declined. (JE 2, p. 8)

Nunemaker testified he continued to experience knee pain, and he started having trouble sleeping because of pain in his shoulders and lower back from bending over to

get dressed. (Tr., p. 31) Nunemaker relayed "[a]nd I had soreness from always, every day, multiple times a day overbending [*sic*] to get dressed in the morning, get dressed, changing my uniform at work, change out of my uniform after work. Multiple times a day I was doing that over and over again." (Tr., p. 31) Nunemaker testified he experienced soreness in his back and described his movement as "a total aberration of what I normally do when I get dressed or put on shoes or socks. It was completely different." (Tr., p. 31)

Nunemaker returned to the company doctor at Mercy Medical Center on June 2, 2014, complaining of right knee pain after twisting his knee at work a few months back. (JE 2, p. 9) Andrew Patterson, M.D., examined Nunemaker, assessed him with a knee strain, and ordered magnetic resonance imaging. (JE 2, p. 9) The reviewing radiologist listed an impression of:

> 1. Nondisplaced horizontal oblique tear of the posterior horn and body of the medial meniscus. Small complicated parameniscal cyst posteromedially.
>
> 2. No acute or stress fracture.
>
> 3. Mild tendinosis/tendinitis of the proximal patellar tendon.
>
> 4. Small knee joint effusion.
>
> 5. Small complicated Baker's cyst.
>
> 6. Chondromalacia in the patellofemoral articulation and along the weightbearing medial femoral condyle.

(JE 3, p. 10; JE 4, p. 17)

Nunemaker was referred to David Tearse, M.D., an orthopedic surgeon, on July 8, 2014. (JE 4, p. 18) Dr. Tearse examined Nunemaker, and listed an impression of a right knee medial meniscus tear with persistent symptoms and early patellofemoral and medial compartment arthrosis. (JE 4, p. 18) Dr. Tearse discussed treatment options with Nunemaker, ordered him to ice his knee as needed, and released him to return to work without restrictions. (JE 4, pp. 18, 21, 23)

Dr. Tearse performed a right knee arthroscopy and partial medial meniscectomy on October 3, 2014. (JE 4, p. 25) During a follow-up appointment on October 9, 2014, Dr. Tearse recommended Nunemaker continue icing his knee and wear a compression sleeve for swelling, referred him to physical therapy, and released him to return to work without restrictions. (JE 4, p. 26)

During a physical therapy appointment on October 10, 2014, the physical therapist documented Nunemaker had "[m]ild hip strength asymmetries and rotational control deficits" and complained of "medial knee 'pulling' with sit to stand." (JE 5, p. 31)

During a physical therapy appointment on October 17, 2014, the physical therapist documented Nunemaker was "[d]emonstrating improved control with hip hinging pattern," his lower extremity flexibility was improving, but still with anterior and posterior chain extensibility deficits and limitations with end range knee mobility. (JE 5, p. 39)

Nunemaker testified a few weeks into his physical therapy, the physical therapist asked him to

> lay on my back and extend my leg upward and then hold my hands behind my knee and then flex my leg up and down ten times, and when I get to the last one, to point my toes towards my head and hold it as long as I could. And when I was doing that exercise, I felt an extremely sharp pain, zap through my back down my buttocks. And I – I didn't – I kind of froze. Didn't know what to do. So I stopped doing that.
>
> And I – the next time I went to the therapist, I told him I was doing that and I had trouble. And he said, "Well, let's give you some other exercises that are less impactful." And he kind of – he manipulated my back a little, just tried to loosen it up a little bit. He said there's a lot of tightness back there. And he – he worked on it. And then he – he changed the type of stretches that I had to do so I wouldn't be doing something quite so extreme.

(Tr., pp. 35-36)

Nunemaker sought treatment from his chiropractor. (Tr., p. 36) On October 22, 2014, Nunemaker attended an appointment with Christianson Chiropractic, complaining of spasms in the lumbar region bilaterally, with constant pain radiating into his left leg distal to the posterior knee, and right leg distal to the posterior knee. (JE 1, p. 6) Nunemaker received treatment, and returned the next day, reporting "[i]t felt better yesterday, it really hurt this morning when I got out of bed, but feeling better now." (JE 1, p. 6)

Nunemaker attended a physical therapy appointment on October 29, 2014. (JE 5, p. 48) The physical therapist documented he was complaining of "medial knee 'pulling' with sit to stand" and noted he had mild lower extremity motor control complaints, decreased right knee range of motion and flexibility, and decreased hip and ankle mobility. (JE 5, p. 48)

During an appointment with Dr. Tearse on October 30, 2014, Nunemaker reported his knee was doing well, but he had experienced "back strain during rehab, which slowed him down a little bit, but he is back now and doing well." (JE 4, p. 27) Dr. Tearse examined Nunemaker, noting there was a trace of an effusion, and he prescribed physical therapy and instructed Nunemaker to use ice. (JE 4, p. 27)

General Mills moved Nunemaker's training duties into a process lead position. (Tr., p. 37) Nunemaker elected not to apply for the process lead position because it was a salaried position and he would have to give up his seniority. (Tr., p. 38) Nunemaker bid on and received a desserts process operator position, which he started in November 2014. (Tr., p. 39) The desserts process operator position is more physical and Nunemaker earned sixty cents less per hour. (Tr., pp. 39-40)

During a physical therapy appointment on November 12, 2014, Nunemaker reported he had changed jobs at work and he has been going up and down stairs a lot more, but he denied any significant soreness. (JE 5, p. 54) The physical therapist documented Nunemaker had a "[d]efinite balance asymmetries R vs L." (JE 5, p. 54)

On December 11, 2014, Nunemaker attended an appointment with Dr. Tearse. (JE 4, p. 28) Dr. Tearse diagnosed Nunemaker with right knee status post arthroscopy. (JE 4, p. 28) Dr. Tearse found Nunemaker was at maximum medical improvement, and released him to return to work without restrictions. (JE 4, p. 28) Nunemaker was discharged from physical therapy on December 21, 2014. (JE 5, p. 56)

Pursuant to a request from Liberty Mutual, Dr. Tearse prepared an opinion letter on December 30, 2014. (JE 4, p. 29) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Tearse assigned Nunemaker a two percent lower extremity impairment, or one percent whole person impairment, based on his diagnosis of a partial medial meniscectomy. (JE 4, p. 29) Dr. Tearse did not recommend any permanent work restrictions. (JE 4, p. 29)

On December 31, 2014, Nunemaker returned to Christianson Chiropractic, complaining of bilateral lumbar pain "that will shoot down into his ankles" with spasms that are worse in the morning. (JE 1, p. 7) Nunemaker testified he continued to experience back pain. (Tr., p. 45) Nunemaker relayed,

> at one point during a day I picked up a 50-pound box, and it shocked me. The pain hit me, and I fell to my knees. And I had to stretch a little bit and able to get back up. And then two more times that day I fell, and I just said, 'I got to get something done.' It was to a point where I couldn't take it anymore.

(Tr., p. 45)

On February 12, 2015, Nunemaker went to urgent care and saw Ann Metzger, M.D., his family practice physician, complaining of back pain and discomfort after receiving physical therapy for his knee. (JE 6, p. 99) Nunemaker reported he was experiencing spasms, and that his condition "is worse after he lies down or when he first gets up in the morning" or if he sits and gets up. (JE 6, p. 99) Nunemaker underwent lumbar spine magnetic resonance imaging. (JE 6, p. 92) The reviewing radiologist listed an impression of: "[m]oderate central canal stenosis and moderate bilateral foraminal stenosis at L4-5, due to posterior disc bulging and bilateral facet arthropathy

and ligamenta flava prominence, in conjunction with grade 1 spondylolisthesis." (JE 6, p. 92)

Dr. Metzger referred Nunemaker to Chad Abernathey, M.D., a neurosurgeon, for a consultation on March 4, 2015. (JE 8, p. 118) Dr. Abernathey reviewed Nunemaker's imaging, listed an impression of a lumbosacral strain following a work injury with subsequent knee surgery, and recommended conservative treatment. (JE 8, p. 118) The next day Nunemaker attended the Mercy Medical Center Pain Clinic and he received an L4-L5 epidural steroid injection. (JE 9, pp. 122-23)

Liberty Mutual sent a missive to Dr. Abernathey on March 19, 2015, inquiring whether physical therapy is the prevailing factor for Nunemaker's back pain. (JE 8, p. 119) Dr. Abernathey responded on March 20, 2015, opining "it is unlikely that the physical therapy caused any specific injury. The relationship to physical therapy is based purely on the patient's report and subjective statement. There is no objective evidence to support a connection between the two." (JE 8, p. 120)

Nunemaker received a second L4-L5 epidural steroid injection on May 7, 2015. (JE 9, p. 125) Nunemaker reported receiving three days relief from the injection. (JE 9, p. 128) Nunemaker continued to complain of back pain and he received treatment in urgent care on May 12, 2015 and May 29, 2015. (JE 6, pp. 101-06)

Nunemaker requested a second opinion and Dr. Metzger referred him to Mary Hlavin, M.D., a neurosurgeon for a consultation on June 12, 2015. (JE 10, p. 129) Dr. Hlavin reviewed Nunemaker's imaging, and examined him. (JE 10, p. 130) Dr. Hlavin assessed Nunemaker with spinal stenosis at L4-L5, with minimal bulging, facet arthropathy, and ligamentous hypertrophy, and offered Nunemaker decompressive laminectomies. (JE 10, p. 130) Dr. Hlavin performed L4 and L5 decompressive laminectomies on Nunemaker on June 22, 2015. (JE 7, pp. 116-17)

Nunemaker attended a follow-up appointment with Dr. Hlavin on July 29, 2015. (JE 10, p. 132) Dr. Hlavin documented Nunemaker's preoperative symptoms were gone and his legs felt good with no numbness, tingling, or weakness, with some stiffness in his back. (JE 10, p. 132) Dr. Hlavin noted she suspected "this was an exacerbation of the underlying condition due to a work-related knee injury" and ordered physical therapy. (JE 10, p. 132) Dr. Hlavin released Nunemaker to return to work with a fifty pound lifting restriction on September 3, 2015, through September 30, 2015. (JE 10, p. 135)

On October 28, 2015, Nunemaker returned to Dr. Hlavin reporting his leg symptoms had fully resolved and he relayed he had been back to work full-time since early September 2015. (JE 10, p. 134) Nunemaker reported he had some stiffness in his back, but he was pleased with the results of his surgery. (JE 10, p. 134) Nunemaker has not received any treatment for his back since Dr. Hlavin released him in October 2015. (Tr., p. 69)

On February 3, 2016, Stanley Mathew, M.D., a physiatrist, performed and independent medical examination for Nunemaker. (Ex. 2) Dr. Mathew examined Nunemaker and reviewed his medical records. (Ex. 2) Dr. Mathew listed an impression of chronic right knee pain, right knee arthroscopic surgery status post right knee meniscus tear, and Grade II chondrosis of the medial femoral condyle, lumbar spine radiculopathy, post laminectomy syndrome status post L4-L5 decompressive laminectomy, chronic low back pain, lower extremity weakness, and lumbar spine radiculopathy. (Ex. 2, p. 11)

Dr. Mathew opined Nunemaker's work activities at General Mills on or about January 5, 2014, were a substantial factor in causing Nunemaker's right knee injury and need for medical care, including surgery. (Ex. 2, p. 11) Dr. Mathew further opined Nunemaker's chronically altered biomechanics and rehabilitation activities for his right knee, "substantially contribute to exacerbation of previously asymptomatic condition in his low back, resulting in the need for surgery performed by Dr. Hlavin." (Ex. 2, p. 11) Dr. Mathew found Nunemaker's chronic right knee weakness, after his injury "led to instability and progressive deterioration of his lumbar spine." (Ex. 2, p. 11) Using Table 17-8 of the AMA Guides, Dr. Mathew assigned a ten percent whole person impairment rating to Nunemaker's right lower extremity, and using Table 15-3 of the AMA Guides, assigned a fifteen percent whole person impairment rating for his lumbar spine injury and resulting surgery. (Ex. 2, p. 11) Dr. Mathew concluded Nunemaker will need chronic pain management, including physical therapy oversight, medication management, and injection therapies for his chronic pain. (Ex. 2, p. 11)

General Mills and Liberty Mutual requested an opinion letter from Dr. Abernathey regarding Nunemaker's lumbar spine condition. Dr. Abernathey sent a letter to the defendants' counsel on March 7, 2016, opining "I would consider the patient's L4-5 spondylolisthesis to be an underlying, pre-existing condition and not related to his workers' compensation injury. Therefore, I do not believe that the patient has any restrictions or impairment related to his lumbosacral spine regarding his work injury or subsequent knee surgery." (JE 8, p. 121)

On March 16, 2016, Nunemaker's attorney sent Dr. Hlavin a letter, asking her to check "correct" or "incorrect" with respect to the following statement:

> 1. It is your medical opinion that Mr. Nunemaker's altered biomechanics and rehabilitation activities of the right knee following his right knee injury on 01/05/14 was a substantial contributing factor in aggravating or accelerating a previously asymptomatic, pre-existing condition at L4/5 (spinal stenosis) causing his low back pain with radicular symptoms and need for medical treatment including the decompressive laminectomy procedures performed by you on 06/22/15.

(JE 10, p. 137) Dr. Hlavin checked "correct." (JE 10, p. 137)

Dr. Tearse issued an opinion letter on July 7, 2016, as follows:

> I last saw Mr. Nunemaker on December 11, 2014 and at that time placed him at maximal medical improvement from his work related injury to his right knee. At that point he was assigned an impairment rating of 2% of the lower extremity, (1% whole person), based on table 17-33, for a partial medial meniscectomy. At that time, on my evaluation, as well as the evaluation of his physical therapist, he had no significant muscle weakness about his right knee. At the time of my evaluation of Mr. Nunemaker on December 11, 2014, he had no additional ratable impairment, other than the 2% impairment for his partial medial meniscectomy.
>
> Any significant change in his status, including significant weakness, would not, in my opinion, be related to the January 4, 2014 work injury to his right knee.

(Ex. A, p. 1)

Before his work injury Nunemaker enjoyed running, and participating in sports. (Tr., p. 62) Nunemaker testified his surgeon instructed him not to run anymore. (Tr., p. 63) Nunemaker used to play football with his son and water ski, but he has not played football or water skied since his work injury. (Tr., p. 63)

Nunemaker performs his normal work duties without restrictions or accommodations. (Tr., pp. 71-72) Nunemaker is earning less than he did before his work injury. (Tr., p. 83) White testified the reason he is earning less is there is not as much opportunity for overtime. (Tr., pp. 83-84)

CONCLUSIONS OF LAW

I. Nature of the Injury

Nunemaker asserts he sustained a work-related injury to his right knee, and sequela injury to his lumbar spine. General Mills and Liberty Mutual contend Nunemaker has sustained a scheduled member injury to his right knee only. General Mills and Liberty Mutual aver Nunemaker is not a credible witness, noting he provided inaccurate and incomplete information to his treating and evaluating physicians concerning his lumbar spine, and thus, he has failed to establish his work injury caused his lumbar spine symptoms and need for surgery.

A. Credibility

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and

knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Nunemaker has an obvious interest in the outcome of this case. I had the opportunity to observe him testify, under oath, during the hearing. During his testimony, Nunemaker engaged in direct eye contact, his rate of speech was appropriate, and he did not make any furtive movements. I find his testimony reasonable and consistent with the other evidence I believe.

While working for Amana Refrigeration, in approximately 1985, Nunemaker sustained a strain to his lumbar spine while lifting a refrigerator liner. (Ex. 4, p. 17; Tr., pp. 11-12) Nunemaker reported he fully recovered from the strain and it did not result in any permanency. (Ex. 4, p. 17) There is no evidence in the medical record that he received ongoing treatment following the injury, which occurred thirty-two years ago. Moreover, when General Mills hired him in 1990, Nunemaker underwent a physical examination as part of the hiring process, which he passed. (Ex. 4, pp. 16-17; Tr., pp. 13-14) Nunemaker worked for General Mills without any difficulty performing his duties over the course of the next twenty-four years, where he regularly lifted items weighing fifty or more pounds, and pushed barrels weighing 100 pounds and fifty-five gallon drums weighing 400 to 500 pounds. (Tr., pp. 17-18)

In the early 1990s while working for General Mills, Nunemaker sought chiropractic treatment of occasional neck and upper back stiffness, unrelated to his lumbar spine. (Ex. 4, p. 17) Nunemaker received chiropractic treatment on December 29, 2011, for lower back pain and neck pain, after bending over, and again on July 16, 2013, for cervical spine complaints. (JE 1, p. 5) The record does not support he was receiving ongoing chiropractic or other medical treatment for lumbar spine complaints before his January 2014 work injury.

While his statement to Dr. Metzger on May 5, 2015, "[h]e never had any back pain ever in his life" is not true, I do not find this inconsistency supports Nunemaker is dishonest and not credible, warranting a finding he has not proven he sustained a sequela injury to his lumbar spine. (JE 6, p. 101) Nunemaker testified he did not think his earlier treatment was relevant. While he is a poor historian, I do not find his failure to identify sporadic treatment he received in the past warrants a finding he is not a credible witness. As noted above, based on my personal observations of Nunemaker's rate of speech, eye contact, and body language, I found him to be a credible witness at hearing.

General Mills and Liberty Mutual contend Nunemaker should not be believed because he never spoke with Dr. Tearse regarding his lumbar spine complaints. (Defendants' Brief at 20) To the contrary, Dr. Tearse documented on October 30, 2014, while Nunemaker had reported his knee was doing well, he had experienced "back strain during rehab, which slowed him down a bit, but he is back now and doing well." (JE 4, p. 27) This documentation occurred within days of the claimed injury during physical therapy, as documented by the subsequent chiropractic treatment he received for bilateral lumbar spasms, and pain radiating to both knees. (Tr., pp. 35-36; JE 1, p. 6)

At hearing Nunemaker was questioned regarding his deposition, where he testified the first time he felt sharp pain in his back, similar to being electrocuted, occurred when he was performing therapy exercises on his back at his home. (Tr., p. 77) During his deposition Nunemaker testified "when I was doing one of the rehab exercises and it felt like somebody shocked me on my tailbone and it ran right up my legs." (Ex. 7, p. 32) Nunemaker reported he had never had symptoms like that before and "[t]hat was a brand-new one for me." (Ex. 7, p. 32) I find his testimony reasonable and consistent with the other evidence I believe.

B. Sequela Condition

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> It is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

The parties stipulated Nunemaker sustained a work injury to his right knee. General Mills and Liberty Mutual contend Nunemaker has failed to establish he sustained a sequela lumbar spine injury, resulting in the need for surgery.

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's

disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Three physicians have provided causation opinions concerning Nunemaker's asserted sequela injury to his lumbar spine, Dr. Abernathey, a neurosurgeon who examined Nunemaker on one occasion, Dr. Hlavin, a neurosurgeon who treated and performed surgery on Nunemaker, and Dr. Mathew, a physiatrist who conducted an independent medical examination for Nunemaker. I find the opinion of Dr. Hlavin, the treating neurosurgeon, as supported by Dr. Mathew, to be most persuasive on the issue of causation.

When Dr. Abernathey examined Nunemaker in March 2015, he noted Nunemaker had denied any "radicular features" or "other neurologic symptoms and signs" and he listed an impression of lumbosacral strain following a work injury with

subsequent knee surgery, but concluded Nunemaker's spondylolisthesis was preexisting and not related to his work event. (JE 8, p. 119) A few weeks later, pursuant to a request from Liberty Mutual, on whether physical therapy is the prevailing factor for Nunemaker's back pain, Dr. Abernathey replied, "it is unlikely that the physical therapy caused any specific injury. The relationship to physical therapy is based purely on the patient's report and subjective statement. There is no objective evidence to support a connection between the two." (JE 8, p. 120) And in March 2016, Dr. Abernathey opined Nunemaker's spondylolisthesis is a preexisting condition not related to his workers' compensation injury. (JE 8, p. 121)

In July 2015, following surgery, Dr. Hlavin noted,

> [u]fortunately, [General Mills] will not allow him to return with restrictions as this was not deemed to be worker's comp, although interestingly this seemed to have all been triggered by a worker's comp-related injury to the knee and him altering his biomechanics for a chronic period of time in order to compensate for the knee injury. I suspect that this was an exacerbation of the underlying condition due to a work-related knee injury.

(JE 10, p. 132) In March 2016, Dr. Hlavin agreed Nunemaker's altered biomechanics and rehabilitation activities were substantial contributing factors in aggravating or accelerating a previously asymptomatic, preexisting spinal stenosis causing his low back pain with radicular symptoms and need for treatment and surgery. (JE 10, p. 137)

Drs. Abernathey and Hlavin, both neurosurgeons, possess training superior to that of Dr. Mathew, a physiatrist. Dr. Hlavin treated Nunemaker and performed surgery on him. Dr. Abernathey examined Nunemaker on one occasion. Dr. Hlavin examined and treated Nunemaker more recently than Dr. Abernathey's single examination.

Moreover, Dr. Hlavin's opinion is supported by Nunemaker's medical records. Nunemaker was not receiving ongoing medical treatment for a lumbar spine condition prior to his knee injury. The record supports he developed acute symptoms in his spine that persisted, following a particularly stressful therapy session and from increased bending while dressing. I conclude Nunemaker has established he sustained a sequela injury to his lumbar spine resulting in the need for treatment and surgery.

II. Medical Expenses

Nunemaker seeks to recover the cost of medical bills for his sequela back injury, set forth in Exhibit 8. An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id.

§ 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability").

The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206.

As analyzed above, Nunemaker's lumbar spine condition was aggravated, accelerated, worsened, or "lighted up" by his work injury. Nunemaker is entitled to recover the cost of all causally related medical bills set forth in Exhibit 8 from General Mills and Liberty Mutual.

III. Healing Period Benefits

The parties stipulated Nunemaker was off work from May 28, 2015 through September 3, 2015. During this period Nunemaker underwent L4 and L5 laminectomies, and he received post-surgical treatment. Nunemaker seeks healing period benefits for the period of time he was off work.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is

permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. The record supports Nunemaker has sustained permanent impairment as a result of the work injury. If Nunemaker is entitled to additional temporary benefits, he is entitled to healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

In Evenson v. Winnebago Indus., Inc., the Iowa Supreme Court held that the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." 818 N.W.2d 360, 372-74 (Iowa 2016). The record supports Nunemaker was off work from May 28, 2015 through September 3, 2015, due to his sequela back injury. Under Evenson, when Nunemaker was released to return to work, his healing period ended. Id.

IV. Extent of Disability

Nunemaker has established he sustained a sequela injury to his lumbar spine after sustaining a work-related injury to his right knee. Injuries to the spine are unscheduled. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner

considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

As discussed above, I find the opinion of Dr. Hlavin most persuasive on the issue of causation with respect to the sequela lumbar spine injury. Two experts have provided opinions on extent of disability with respect to Nunemaker's right knee, Dr. Tearse, the treating orthopedic surgeon who performed surgery on Nunemaker, and Dr. Mathew, a physiatrist retained to conduct an independent medical examination. I find the opinion of Dr. Tearse who treated Nunemaker most persuasive with respect to the right knee condition.

Using Table 17-33 of the AMA Guides, Dr. Tearse assigned a two percent lower extremity or one percent whole person impairment for Nunemaker's partial medial meniscectomy. (Ex. A, p. 1) Dr. Tearse did not issue any permanent work restrictions. (Ex. A, p. 1) Using Table 17-8 of the AMA Guides, Dr. Mathew assigned a ten percent whole person impairment to Nunemaker's right lower extremity, which requires findings concerning flexion or extension. (JE 2, p. 11) Dr. Mathew's report notes Nunemaker's passive range of motion of the left lower extremity is within functional limits, but he makes no express finding concerning passive range of motion of the right knee in his report. (Ex. 2, p. 10) Dr. Tearse properly assigned a two percent permanent impairment rating or a one percent impairment to the body as a whole, based on the procedure he performed.

Dr. Mathew assigned a fifteen percent whole person impairment for Nunemaker's lumbar spine, using Table 15-3 of the AMA Guides. (Ex. 2, p. 11) His opinion is unrebutted.

At the time of the hearing Nunemaker was fifty-five. (Tr., p. 6) Nunemaker is a high school graduate. (Tr., p. 7; Ex. 4, p. 16) Nunemaker has worked in factories for most of his adult life. (Ex. 4, p. 16; Tr., pp. 7-13) Nunemaker has worked for General Mills for twenty-seven years. (Ex. 4, p. 16; Tr., p. 13) Nunemaker performs his normal work duties without restrictions or accommodations. (Tr., pp. 71-72) He has not looked for other employment. Nunemaker is earning less than he did before his work injury. (Tr., p. 83) The decrease in his earnings is due to reasons other than his work injury. (Tr., pp. 83-84) Considering the factors of industrial disability, including his continued employment with General Mills, where he performs his normal duties, I conclude Nunemaker has sustained a twenty-five percent industrial disability, commencing on September 4, 2015.

V. Costs

Nunemaker seeks to recover the $100.00 filing fee for the petition, $13.34 for service costs, and $116.80 for Nunemaker's deposition.[1] (Ex. 9) Iowa Code section

[1] At the start of the hearing General Mills and Liberty Mutual reported they had agreed to pay for the $1,063.20 cost of Dr. Mathew's independent medical examination and report.

86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (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, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs Nunemaker seeks to recover. Using my discretion, I find the $100.00 filing fee, the $13.34 service fee, and the $116.80 cost of Nunemaker's deposition should be assessed to General Mills and Liberty Mutual.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant healing period benefits from May 28, 2015 through September 3, 2015, at rate of nine hundred forty-three and 95/100 dollars ($943.95) per week.

Defendants pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, at the rate of nine hundred forty-three and 95/100 dollars ($943.95) per week, commencing on September 4, 2015.

Defendants shall take credit for all benefits previously paid, including sick pay/disability income stipulated to on the hearing report.

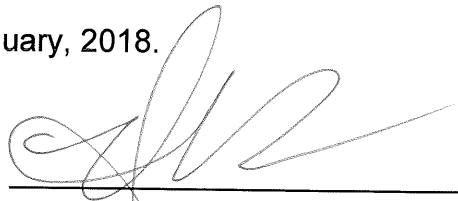
Defendants shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

Defendants are responsible for all causally related medical bills set forth in Exhibit 8.

Defendants are assessed the one hundred and 00/100 dollars ($100.00) cost of the filing fee, the thirteen and 34/100 dollars ($13.34) cost of service, and the one hundred sixteen and 80/100 dollars ($116.80) cost of Nunemaker's deposition.

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

Signed and filed this 25th day of January, 2018.



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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.