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FIND THE HIDDEN SAVINGS IN WORK-RELATED INJURY CASES

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FIND THE HIDDEN SAVINGS IN WORK-RELATED INJURY CASES

I. INTRODUCTION

A. CLNC® Consultants Can Provide Savings to Clients in the Following Areas:

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2. Medical causation.
3. Clarification of future medical needs.
4. Determination of medical costs.

II. COMMON WORKERS’ COMPENSATION CASES

A. Accidental Injury

1. History.
2. Benefits provided.
   a. Private insurance carriers.
   b. Monopolistic state fund.
   c. Competitive state fund.
   d. Self-insurance.
4. Injury by accident case study. (Exhibit A)

B. Occupational Disease

1. Additional considerations.
   a. Statutory limitations.
   b. Is employee exposed to harmful chemicals through work operations?
   c. Do some exposures result from other operations in the workplace?
   d. Does exposure have nothing to do with employment?
2. Choosing the right physician.
3. Occupational disease case study. (Exhibit C)

C. Injuries and Diseases Covered Under the Federal Workers’ Compensation Law
   1. Jurisdiction.
   2. Introduction to Jones Act.
   3. Introduction to Longshore and Harbor Workers’ Compensation Act.
   4. Other federal employee compensation statutes.
      d. Migrant and Seasonal Agricultural Worker Protection Act.
   5. Federal Employees’ Compensation Act case study. (Exhibit F)

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A. The Work Injury Caused the Condition
   1. Cumulative trauma, pre-existing medical conditions and co-morbid medical conditions case study. (Exhibit B)

B. The Work Injury Materially Aggravated a Pre-Existing Condition
   1. Aggravation of a pre-existing condition case study. (Exhibit D)

C. Last Exposure v. Last Injurious Exposure
   1. Last exposure v. last injurious exposure case study. (Exhibit E)

D. Occupational Disease
   1. Occupational disease case study. (Exhibit C)
IV. COMMON DEFENSES FOR WORKERS’ COMPENSATION CASES

A. Medical Causation Not Established

B. Biomechanism of Injury Does Not Match Diagnosis

C. Last Exposure and Last Injurious Exposure

V. THE ROLE OF THE CERTIFIED LEGAL NURSE CONSULTANT<sup>CM</sup> IN WORKERS’ COMPENSATION CASES

A. Assess Medical Causation

1. Determine whether the work injury caused the condition or materially aggravated a pre-existing condition.
   a. Obtain and review pre-existing and current medical records.
   b. Consider state statutes and documentation needed for denial.
      (1) Opinion from treating physician.
      (2) Peer review or physician advisor review.
      (3) Independent medical examination.
   c. Obtain physician’s explanation of opinion.
   d. Last exposure versus last injurious exposure.
   e. Savings to client.
      (1) Medical costs.
      (2) Indemnity costs.
      (3) Future permanent partial disability.

B. Direction of Medical Care

1. Determine if employer or employee choice state.
   a. Employer choice states.
      (1) Employer selection throughout claim.
      (2) Employer initial selection.
   b. Employee choice states.
      (1) Employee choice throughout claim.
      (2) Employee Initial choice.
      (3) Selection from list by state agency.
      (4) Selection from list by employer – panel.
2. Consider options for treating physician specialty.
      (1) Occupational medicine as treating physician.
         (a) Focus on return to work.
         (b) Will refer to specialist if needed.
      (2) Orthopaedic surgeon as treating physician.
         (a) Frequently see surgery recommended – may or may not be appropriate.
         (b) Surgery being completed in surgery center owned by surgeon can increase medical costs on claim.

C. Biomechanism of Injury
   1. Review recorded statement and witness statements.
   2. Review initial medical records.
   3. Is any additional clarification or expertise needed?
      a. Consider a causation expert or biomechanical engineer.
      b. Additional medical review by a physician specializing in occupational medicine or diagnosis.

D. Analyze Medical Reports
   1. Treating physician.
   2. First aid records from employer.
   3. Ambulance records.
   4. Hospital records.
   5. Specialized medical care.
   6. Diagnostic reports.
   7. Therapy records.
   9. Chiropractic notes.
  10. Pharmacy records.
11. Medical and pharmacy payment records.
12. Pre-existing medical records.

**E. Clarify Future Medical Needs and Costs**

1. Review pre-existing and current medical records.

2. Determine and document future medical treatment anticipated.
   a. Treating physician.
   b. Evidence based medicine guidelines.
   c. Utilization review.
   d. Peer review or physician advisor.
   e. Independent medical examination.

3. Savings to client.
   a. Avoid potential litigation by clarifying early in claim.
   b. Future medical costs.
   c. Future indemnity costs.
      (1) Temporary total disability (TTD).
      (2) Permanent partial disability (PPD).

**F. Determine Medical Costs**

1. Prescription drug use review.
   a. Appropriateness of current prescriptions for work-related diagnosis.
      (1) Narcotics.
      (2) Other prescriptions.
   b. Is physician prescribing the medication authorized by the workers' compensation carrier (state specific)?
   c. Tennessee Pain Management Bill. *(Exhibit G)*

2. Durable medical equipment.
   a. Recommendation of durable medical equipment (DME) by the treating physician.
   b. Appropriateness of recommended DME for the work-related injury.
   c. Cost containment options for DME.
      (1) Negotiation of DME directly with provider.
      (2) Use of vendor networks.
   d. DME – not FDA approved nor supported by evidence-based medical guidelines.
3. Medical bill review.
   a. Obtain a copy of medications dispensed, amount dispensed and cost.
   b. Document what is related or not related to the compensable injury.
   c. Determination of what is medically necessary to the compensable injury.

G. Death Claims

1. Obtain a copy of the medical records and autopsy report.
   b. Could cause of death result from the reported work injury?
   c. Do pre-existing medical records need to be obtained and reviewed?
   d. Further medical clarification needed.
      (1) Treating physician.
      (2) Peer review or physician advisor.

2. Cost savings to client.
   a. Denial of medical and death benefits.

H. File Preparation for Deposition or Mediation

1. Ensure all medical records, pre- and post-accident have been received and complete a chronological medical review.

2. Identify strengths and weaknesses of the relevant opinion.

3. Assist with rebuttal of experts.

4. Attend mediation with claims representative or manager as a consultant.

VI. INTERROGATORIES AND REQUESTS FOR PRODUCTION

A. Interrogatories Directed to the Defense

1. Please list training provided to the injured worker from (Date) __________ to (Date) __________ by (Employer) __________ related to the use of the safety equipment provided including:
   a. Dates of training.
   b. Type of equipment training each date.
   c. Qualifications of the instructor providing the training.
2. Please describe the location of the work incident on (Date) __________ at (Employer/Facility) __________.

3. Please identify if any other workers have reported similar reactions to this chemical at (Employer/Facility) __________.

4. Please describe the operating condition of the forklift in question on (Date) __________ at (Employer/Facility) __________.

5. Please list any repairs made to the forklift in question on or after (Date) __________ at (Employer/Facility) __________.

6. Please describe the hiring policies in effect from (Date) __________ to (Date) __________ at (Facility/Employer) __________ related to post offer, pre-employment testing and physical.

7. Please describe any first aid practice and policies provided to the injured worker with regard to this injury from (Date) __________ to (Date) __________ by (Employer) __________.

B. Interrogatories Directed to the Plaintiff

1. Please list the following for the incident that occurred on (Date) __________ at (Facility) __________:
   a. The location of the work incident.
   b. What the employee was doing on (Date) __________.
   c. Witnesses to the incident on (Date) __________.
      (1) Witness names.
      (2) Witness addresses.
      (3) Witness phone numbers.

2. Please describe the machinery the employee was operating on (Date) __________.

3. Please list training that the employee received on the machinery at (Facility) __________ from (Date) __________ to (Date) __________.

4. Please describe safety equipment employee was wearing at the time of the work incident on (Date) __________ at (Facility) __________.

5. Please describe plaintiff’s job duties at employer (Employer) __________ from (Date) __________ to (Date) __________.
6. Please describe specific details related to plaintiff’s job duties at (Employer) __________ from (Date) __________ to (Date) __________.
   a. List each activity.
   b. List the percentage of each day spent on each activity.
   c. Describe the amount of weight plaintiff is required to push.
   d. Describe the amount of weight plaintiff is required to lift.
   e. List any additional activities required of plaintiff throughout the work day.

7. Please list any pre-existing medical diagnoses or surgeries plaintiff has had to the injured area from (Date) __________ to (Date) __________.

8. Please describe details with regard to treatment for pre-existing medical diagnoses or surgeries the plaintiff has had for the injured area:
   a. Include the date of treatment.
   b. Treating physician.
   c. Type of treatment.

C. Requests for Production Directed to the Defense

1. Please provide a copy of all material safety data sheets (MSDS), policies and safety recommendations for all chemicals located in (Employer) __________’s plant that were in effect from (Date) __________ to (Date) __________.

2. Please provide a detailed copy of the job description the injured worker was performing at the time of the injury from (Date) __________ to (Date) __________.

3. Please provide a copy of the injured workers’ human resource file from (Employer) __________ from (Date) __________ to (Date) __________.

4. Please provide a copy of all safety training provided to the employee from the (Date of hire) __________ through the (Date of Injury) __________.

5. Please provide the qualifications of the instructor who provided safety training at (Facility) __________ from (Date) __________ to (Date) __________.
6. Please produce signed documents indicating injured worker acknowledged a thorough understanding of the training in effect from (Date) __________ to (Date) __________ at (Facility) __________.

7. Please provide a copy of any witness statements that were taken with regard to the work injury at (Facility) __________ from (Date) __________ to (Date) __________. Please include:
   a. Job description of the witnesses.
   b. Name, address and phone number of the witnesses.
   c. Affiliation with the injured worker or the (Employer) __________.

D. Requests for Production Directed to the Plaintiff

1. Please provide a copy of all (Plaintiff) __________’s medical records from all treating providers from (Date) __________ to (Date) __________.

2. Please provide a list of plaintiff’s employers from (Date) __________ to (Date) __________ and include:
   a. Dates of employment.
   b. Name of employer.
   c. Job description.
   d. Chemicals exposed to during that employment.

3. Please provide a detailed listing of all plaintiff’s hobbies from (Date) __________ to (Date) __________ and include:
   a. Start date of the hobbies.
   b. Activities involved in plaintiff’s hobbies.
   c. Amount of time spent daily on hobbies.
   d. Chemicals plaintiff exposed to when working on hobbies.

4. Please provide a detailed listing of all plaintiff sales products from (Date) __________ to (Date) __________ and include:
   a. Products plaintiff may sell.
   b. Locations where products are displayed.
   c. Weight of products and how products are displayed.
   d. Income received from these sales by year.

5. Please provide a detailed listing of any volunteer activities in which plaintiff has been involved from (Date) __________ to (Date) __________ including:
   a. Dates of involvement.
   b. Location of involvement.
   c. Details of any specific duties of the volunteer activities.
VII. RECOMMENDED QUALIFICATIONS FOR CLNC® SUBCONTRACTORS FOR WORKERS’ COMPENSATION CASES

A. Certified Occupational Health Nurse (COHN)

B. Senior Claims Law Associate (SCLA)

C. Certified Case Manager (CCM)

D. Workers’ Compensation Case Management Experience – Five Years Minimum

E. Experience in Specific Clinical Background That Matches the Work Injury

F. Ergonomics Training

G. Safety and Loss Control Training

VIII. POTENTIAL CLIENTS FOR CLNC® CONSULTANTS IN WORKERS’ COMPENSATION CASES

A. Workers’ Compensation
   1. Insurance companies.
   2. Third-party administrators (TPA).
   3. Large self-insured employers.
   5. Medium to large employers with an insurance company or TPA.

B. Plaintiff and Defense Attorneys
C. Other
   1. Independent medical examination physician.
   2. Peer review physician.

IX. MARKETING STRATEGIES TO ATTAIN WORKERS’ COMPENSATION ATTORNEY-CLIENTS

A. CLNC® Consultant’s Area of Expertise

B. Identify Potential Attorney-Clients
   1. Location based on service offered.

C. Know Your Competition’s Attorney-Clients

D. Know Your Attorney-Clients

E. Soft Savings and Benefits to CLNC® Consultant’s Clients
   1. Avoidance of litigation.
   2. Customer retention.
   3. Accuracy of claims decisions and medical reserving.
   5. Prior work product examples.

F. Establish Rates

G. Marketing Materials
H. Networking
1. With other CLNC® consultants.
2. At claims association meetings.
3. At state workers’ compensation seminars.
4. With case management vendors.
5. With other workers’ compensation cost containment vendors.
6. Attend attorney seminars and legal conferences.

X. CASE STUDIES
A. Injury by Accident or Accidental Injury (Exhibit A)
B. Cumulative Trauma, Pre-Existing Medical Conditions and Co-Morbid Medical Conditions (Exhibit B)
C. Occupational Disease (Exhibit C)
D. Aggravation of a Pre-Existing Condition (Exhibit D)
E. Last Exposure v. Last Injurious Exposure (Exhibit E)
F. Federal Employees’ Compensation Act — Longshore and Harbor Workers’ Compensation Act (Exhibit F)

XI. RESOURCES
A. Websites
1. Iowa Workforce Development, Division of Workers’ Compensation. lowaworkforce.org/wc/

   [dol.gov/owcp/dfec/](dol.gov/owcp/dfec/)
CINDY SCHAFF,

Claimant,

vs.

ALTOONA NURSING & REHABILITATION CENTER, ALTERNATE MEDICAL
Employer, CARE DECISION

and

THE HARTFORD,

Insurance Carrier, Defendants.

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the “alternate medical care” rule, is invoked by claimant, Cindy Schaff.

This alternate medical care claim came on for hearing on May 2, 2012. The proceedings were recorded digitally, and constitute the official record of the hearing. By an order filed by the workers’ compensation commissioner, this decision is designated final agency action. Any appeal would be by petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of claimant’s exhibits 1 through 5, defendants’ exhibit A, and the testimony of claimant. Defendants’ exhibits were numbered by the undersigned for clarity of the record.

ISSUES

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of C4-5 and C5-6 facet injections and prescribed medication as recommended by M.S. Iqbal, M.D.
FINDINGS OF FACT

Defendants admitted liability for claimant’s injury on February 14, 2011. Records indicate claimant had a slip and fall injury at work.

On March 15, 2011, claimant underwent physical therapy for the injury with Brad Earp, P.T. Physical Therapist Earp indicated claimant was inconsistent with locations of her pain. Notes from Physical Therapist Earp indicated claimant had complaints of pectoral pain but indicated “shoulder/neck/arm issues” had fully resolved. (Exhibit A, pages 9-10) Claimant testified that in March of 2011 she still had neck and shoulder pain.

An MRI of claimant’s cervical spine, performed on March 30, 2011, showed degenerative spondylolisthesis at the C5-C6 levels with degenerative disease at the C4-C5 and C6-7 levels. (Ex. A, pp. 8-9)

Claimant was evaluated by Ingrid Lundgren, PA-C on April 8, 2011. Claimant was assessed as having a thoracic strain. (Ex. A, p. 9)

Claimant was evaluated by Cassim Igram, M.D., in May 2011. Dr. Igram noted claimant’s main complaint was on the anterior portion of the left shoulder. Claimant was assessed as having a left shoulder pathology and was referred to a shoulder specialist. (Ex. A, pp. 4-5) Claimant testified that at the time of the visit she was having both shoulder and neck symptoms.

On or about June 30, 2011, claimant was evaluated by Stephen Ash, M.D., for left shoulder pain. Claimant noted a shoulder injection provided relief. Claimant was assessed as having a left shoulder impingement syndrome. She was prescribed Celebrex. (Ex. A, p. 3)

On July 19, 2011, claimant was evaluated by Dr. Ash with continued left shoulder pain. She was assessed as having a left shoulder impingement. Claimant was given a cortisone injection to the left shoulder. Claimant noted improvement in pain following the injection. (Ex. A, p. 2)

On July 27, 2011, Dr. Ash opined claimant’s left shoulder problems were related to her February 14, 2011 injury. Claimant was not at maximum medical improvement (MMI) and was still being treated for her condition. (Ex. A, p. 1)

On December 28, 2011, claimant was evaluated by Dr. Iqbal. Dr. Iqbal is an anesthesiologist specializing in pain medicine. He is authorized by defendants to treat claimant. Claimant said she was referred by Dr. Ash to Dr. Iqbal for pain treatment. Dr. Iqbal evaluated claimant’s range of motion in the shoulder and neck. Claimant was tender at the anterior glenoid in the shoulder and tender in the C4-5 and C5-6 levels in the neck. He gave claimant a prescription for Celebrex and Tramadol. He also recommended claimant have facet injections in the C4-5 and C5-6 levels. (Ex. 1)

On or about January 6, 2012, Dr. Iqbal completed a questionnaire for defendant insurer. He indicated claimant’s fall aggravated claimant’s facet joints and caused a facet joint strain. He noted that the MRI showed degenerative disease aggravated by claimant’s fall. He recommended Celebrex to treat claimant’s February 2011 fall. (Ex. 5)

In a February 22, 2012 letter from claimant’s counsel to defendants’ counsel, claimant requested the injections recommended by Dr. Iqbal be authorized. (Ex. 2) In a March 5, 2012
letter defendants counsel denied approval of Dr. Iqbal’s suggested treatment. (Ex. 3) Claimant’s counsel again requested claimant be authorized to have the injections and medication recommended by Dr. Iqbal. (Ex. 4)

Claimant testified that since her fall she has had both neck and shoulder symptoms. She testified she continues to have neck pain. She testified she wants to have the injections and medication recommended by Dr. Iqbal to treat her pain.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

Dr. Iqbal is an authorized treating physician. He recommends claimant have a facet injection at the C4-5 and C5-6 levels. He also prescribed Celebrex and Tramadol. Claimant desires this treatment for neck pain. Given this record, claimant has proven she is entitled to the requested alternate care.

I appreciate defendants’ position. Defendant’s counsel contends that Dr. Iqbal did not have access to medical records generated by Dr. Ash, and other treating physicians, prior to his evaluation of claimant in December 2011. Defendants counsel suggests that Dr. Iqbal did not have those records to review, and as a result, his recommendations for injections and medication are not made with all the available medical information.

However, defendants counsel’s assertions are not evidence in this matter. There is no indication in the record that Dr. Iqbal did, or did not, have access to claimant’s prior medical records. Exhibit 1 does note that Dr. Iqbal recognized claimant had pain in both her shoulder and her
neck. Based on his evaluation of claimant, Dr. Iqbal recommended neck injections in the cervical spine and prescribed Celebrex and Tramadol.

ORDER

THEREFORE, it is ordered:

That claimant’s petition for alternate medical care is granted. Defendants are to authorize the C4-5 and C5-6 injections, and the medication prescribed by Dr. Iqbal.

Signed and filed this 4th day of May, 2012.

JAMES F. CHRISTENSON
DEPUTY WORKERS' COMPENSATION COMMISSIONER
Exhibit B
Cumulative Trauma, Pre-Existing Medical Conditions and
Co-Morbid Medical Conditions

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN ANTONIO JOYA,

Claimant,

vs.

JB SWIFT AND COMPANY,

ARBITRATION

Employer,

DECISION

and

AMERICAN ZURICH,

Insurance Carrier,

Defendants.

HEAD NOTE Nos.: 1803; 2401; 3701

STATEMENT OF THE CASE

Juan Joya, claimant, has filed a petition in arbitration and seeks workers' compensation benefits from JB Swift and Company (Swift), employer and American Zurich, insurance carrier, as defendants.

This matter came on for hearing before deputy workers' compensation commissioner, James Elliott, on January 11, 2012, in Des Moines, Iowa. The case was fully submitted on February 15, 2012. The record in the case consists of claimant's exhibits 1 through 7; defendants' exhibits A through P; as well as the testimony of the claimant. Emilia Jorge-Hugg provided interpretation at the hearing.

ISSUES

Whether the claimant has suffered an injury on December 11, 2009 that arose out of and in the course of employment.

Whether the claimant provided notice under Iowa Code section 85.23.

The extent of the claimant’s disability.

Payment of an independent medical examination and report by a vocational expert.

Whether the claimant is entitled to alternate medical care.

Assessment of other costs.
The stipulations contained in the hearing report are incorporated by reference in this decision. Temporary benefits are not in dispute.

FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:
The claimant, Juan Joya was 51 years old at the time of the hearing. Mr. Joya attended school through the 6th grade in El Salvador. (Exhibit 1, page 1) He has no formal education. His primary language is Spanish and he cannot read or write English. Mr. Joya worked with his father in agriculture in El Salvador. He came to the United States in December 1996. (Transcript, page 14) Mr. Joya started work for Swift in January 1997. He worked for Swift for 12 years. (Tr. p. 15) In January 1998, the claimant started working with a Whizard knife, trimming loins. (Tr. pp. 15, 16) Mr. Joya stopped working for Swift on December 10, 2009 due to health problems related to his kidneys. (Tr. p. 19) Mr. Joya said he worked two periods as a dishwasher, for eight months in 2006 and three months in 2011. (Tr. p. 19)

Mr. Joya testified he told his supervisor, Freddy Juarez, on August 15, 2007 his shoulder was hurting from the work he was performing. Mr. Joya said he told the infirmary, on the same day, his shoulder was hurting from his work with the whizard knife. (Tr. pp. 21, 22; Ex. 1, p. 3) Mr. Joya said he received ice for his shoulder from the infirmary. Mr. Joya testified his shoulders continued to bother him after August 15, 2007 and was in really bad shape with his shoulders. (Tr. p. 22) In an interrogatory answer, the claimant said he went to the nurses’ station a number of times and was told to put ice on his shoulder and the nurses would put cream on his shoulder. (Ex. 1, p. 3) He kept working even when his shoulders were causing him pain. Mr. Joya said his right shoulder hurts more than his left. He said that when he is sweeping, mopping or picking up anything heavy his shoulder hurts.

Mr. Joya stated he continued to complain about his shoulders to Swift’s supervisors in 2007, 2008 and 2009. He also said he complained to his family doctor, Craig Shadur, M.D. (Tr. p. 32) He said that he would complain to Dr. Shadur every time he saw him about his shoulders, as well as complaining to Dr. Swinton. (Tr. p. 37) Mr. Joya was hospitalized three times in 2009 due to his kidneys failing and pneumonia. He was hospitalized on December 11, 2009 for pneumonia. (Tr. p. 40) His last day of work for Swift was December 10, 2009.

Mr. Joya was found eligible for Social Security Disability (SSD) in June or July 2010 with an onset date of December 11, 2009. (Ex.1, p. 6; Ex. J, p. 3; Ex. F, p. 2) Mr. Joya listed the following conditions in his SSD application as the bases of his disability;

- End stage renal failure.
- Status post living related renal transplant.
- Systemic arterial hypertension.
- Chronic immunosuppressive therapy.
- Type II diabetes mellitus.
- Hyperlipidema.
- Respiratory failure.

(Ex. F, p. 22)
There is no specific complaint in Mr. Joya’s SSD application concerning his bilateral shoulder problems. (Ex. F, pp. 6 – 30)
On January 4, 2010, Dr. Shadur wrote a “To Whom It May Concern” letter stating the claimant was permanently disabled from doing slaughterhouse work due to his end-stage renal failure,
status post living related renal transplant, systemic arterial hypertension, chronic immunosuppressive therapy, type II diabetes mellitus and hyperlipidemia. (Ex. E, p.4) On May 18, 2010, Dr. Shadur examined Mr. Joya. Dr. Shadur is a nephrologist. (Ex. 4, p. 15) Dr. Shadur noted in his report, “He [Mr. Joya] is complaining of bilateral shoulder difficulties with inability to abduct his arms. The patient attributes a lot of this related to his previous employment working in the meat industry.” (Ex. 2, p. 7) Dr. Shadur’s assessment was, “Bilateral shoulder discomfort. I think this is most consistent with rotator cuff injury and will see if we cannot get an MRI done at the hospital in Marshalltown to better diagnose this and, if necessary, refer him to orthopedic surgery.” (Ex. 2, p. 7) On April 4, 2011, Dr. Shadur wrote,

His interval history includes ongoing problems with both shoulders. This dates back over the past 4 to 5 years and relates to the work that he was doing in the meat packing plant with repetitive use of both arms in using a knife for his work. It has resulted in his inability to be able to be gainfully employed in his usual profession in the meat slaughtering business.

Shoulder discomfort. I think there is no question that the patient’s shoulder issue is related to his work and has been progressive over the past 4 to 5 years. I reviewed the office medical records dating all the way back to 1998 and did not see any documentation about this issue but do remember visiting with him on several occasions about this. Because of the multiplicity of his medical problems this was probably not addressed in the medical record.

(Ex. 2, p. 10)

Jacqueline Stoken, D.O., performed an independent medical examination (IME) on August 25, 2011. (Ex. 4, pp. 15 – 19) Dr. Stoken noted that a June 6, 2011 left and right shoulder x-ray of the left and right shoulder showed right greater than left acromioclavicular joint degeneration osteoarthritis. (Ex. 4, p. 16) Mr. Joya complained of pain in both shoulders that increased with activity. (Ex. 4, p. 16) Dr. Stokes’s impression was,

Status post work injury in December 2009 due to cumulative trauma to the bilateral shoulders, elbows and wrists. Chronic pain of bilateral upper extremities due to bilateral shoulder impingement syndrome, bilateral lateral epicondylitis and bilateral wrist tendonitis.

(Ex. 4, p. 18)

Dr. Stoken stated the Mr. Joya’s diagnoses were causally related to Mr. Joya’s work at Swift. (Ex. 4, p. 18) Dr. Stoken found Mr. Joya had an 11 percent impairment to the whole person for the right upper extremity and 9 percent impairment to the whole person for the left upper extremity. Dr. Stoken found the claimant had a combined impairment of 19 percent to the whole body according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Stoken recommended restrictions of avoiding repetitive keying, gripping and pinching, pushing and pulling and work above the shoulder level. (Ex. 4, p. 18)

Scott Neff, D.O., performed an IME on October 26, 2011. (Ex. B, pp. 1 – 8) Dr. Neff noted Dr. Shadur had stated the claimant was disabled from work in a packinghouse as of January 4, 2010 due to pulmonary and cardiac conditions. (Ex. B, p.2) Dr. Neff obtained x-rays of the claimant’s shoulders. Dr. Neff wrote,
AP x-ray of the right shoulder shows osteolysis of the AC joint, significant spurring at the anterior acromion, and a well-maintained subacromial space. Outlet view of the left shoulder shows impingement signs, spurring of the acromion, and a fluid shadow consistent with AC joint bursitis and subacromial bursitis. Axillary lateral view of the right shoulder shows a well-maintained glenohumeral articulation. Outlet view of the left shoulder shows significant AC joint arthrosis, spurring of the acromion, and spurring at the AC joint. Glenohumeral joint appears healthy. Outlet view of the right shoulder shows some spurring of the right acromion, less so than on the left; and axillary lateral of the left shoulder shows a well-maintained glenohumeral relationship with minimal arthritic changes.

Lateral x-ray of the left elbow shows no significant arthritic disease in the radiocapitellar joint. There is a small olecranon spur posteriorly. AP view of the left elbow shows subcutaneous metal fragments. The radiocapitellar joint appears normal, and the humeral ulnar joint appears normal in the left elbow. The etiology of the metal debris is unclear.

X-rays of the right elbow show no significant arthritic change except for a small post olecranon spur. There is no subcutaneous metallic foreign debris on the right side. There are minor arthritic changes at the humeral ulnar joint in the right elbow, especially medially, which were not noted on the left.

(Ex. B, pp. 3, 4)
Dr. Neff noted the claimant had not worked in some time and under most circumstances, symptoms that were due to activity would diminish. Dr. Neff stated he did not find any evidence of a specific injury of Mr. Joya at Swift. Dr. Neff wrote that impingement syndrome is commonly associated with middle age. (Ex. B, p. 5) Dr. Neff noted rotator cuff tears are best studied with a CT arthrogram or contrast MR scan. (Ex. B, pp. 6, 7) Dr. Neff recommended MR scans of both upper extremities. There is no record of these test being performed on Mr. Joya. Dr. Neff did not provide a rating for the left and right extremities. Dr. Neff stated that if the claimant was required to use the whizard knife overhead in his dominant side, and then his work could contribute to his impingement syndrome on his right side. (Ex. B, p. 6)

On November 23, 2011, defendants’ requested “… Dr. Neff to review the job description & provide a report if he believes this injury is not work related. No report is needed if he believes this injury is work related per the job description.” (Ex. B, p. 9) The job description provided to Dr. Neff specifies the work was considered very light work. The description also specified there was frequent rotating of the upper body, frequent reaching by the hands and arms in any direction and frequent handling, including seizing, pinching, or otherwise working with fingering primarily, rather than the hands. (Ex. B, p. 10) On November 26, 2011, Dr. Neff stated he had reviewed the job description and as Mr. Joya’s job was described as very light he did not believe that performance of the job would cause Mr. Joya injury. (Ex. B, p. 2)

Phil Davis, M.S., provided a vocational assessment of Mr. Joya on December 1, 2011. (Ex. 5, pp. 33 – 38) Mr. Davis reported Mr. Joya had taken some initial ESL (English as a second language) classes in April 2011 and was planning to restart his classes. (Ex. 5, p. 34) Mr. Davis concluded Mr. Joya worked in unskilled labor and had no transferable skills. (Ex. 5, p. 37) Mr. Davis concluded that with the restriction provided by Dr. Stoken, his lack of transferable skills and lack of English language skills, his ability to obtain employment has been eliminated. (Ex. 5, p. 38)
Mr. Joya had a number of hospitalizations leading up to the ending of his employment with Swift. On January 22, 2009, September 7, 2009, October 23, 2009, November 26, 2009, December 11, 2009 and February 4, 2010, Mr. Joya was hospitalized for flu, pneumonia, congestive heart failure and respiratory distress. (Ex. C, pp. 1 – 13; Ex. D, pp. 1 – 18) On October 23, 2009, Lance Van Grundy, M.D., noted, “He [Mr. Joya] denies chest, neck or shoulder pain.” (Ex. C, p. 1) On December 11, 2009, Dr. Van Grundy noted, “He [Mr. Joya] does have some degree of ongoing right shoulder pain that does not seem affected or related to his other symptoms.” (Ex. C, p. 9)

Records from Primary Health Care on February 24, 2011 and July 20, 2011 show the claimant was complaining of bilateral shoulder pain. (Ex. 3, pp. 13, 14)

The defendants submitted surveillance of Mr. Joya. (Ex. H, pp. 4 – 9 and DVD) The surveillance and report were not dispositive on any issue in this case. The surveillance did show Mr. Joya working on a hose on his car engine, but that activity does not materially conflict with his impairments or diminish his credibility.

CONCLUSIONS OF LAW

The threshold issue is thus whether this is a cumulative trauma injury to his shoulders. The evidence supports a finding that the claimant’s bilateral shoulder injury was something that developed over time as a result of a repetitive work in his job.

I do not find Dr. Stoken’s opinion concerning causation compelling. She does not perform a thorough evaluation of Mr. Joya’s work. Dr. Neff’s opinion leaves something to be desired as well. In his opinion of October 26, 2011, he stated that work overhead with the claimant’s right arm could cause impingement. Relying upon the description of “very light work” he holds there is no work injury, although the job descriptions states the job requires frequent reaching of the hands and arms in any direction. There was no testimony by the claimant he worked overhead. Dr. Stoken frequently provides reports at the request of claimant’s counsel and Dr. Neff frequently provides reports at the request of defendant’s counsel. If these were the only two causation opinions, I would hold Mr. Joya did not meet his burden of proof. However, we have the opinions of Dr. Shadur to consider as well.

Dr. Shadur has provided treatment to the claimant for many years. Dr. Shadur wrote that while he did not record in his medical records Mr. Joya’s shoulder complaints, he does remember having a number of discussions concerning the shoulders on several occasions. There is other evidence that supports the claim of repetitive trauma. Mr. Joya testified he received treatment from occupation health at Swift for his shoulders. Mr. Joya’s emergency admission on December 11, 2009, noted Mr. Joya had some degree of right shoulder pain that was not related to his other symptoms. Mr. Joya testified that his work was repetitive. He credibly testified that he trimmed thousands of loins a day, year after year using the Whizard knife. The repetitive nature of claimant’s position led to a bilateral cumulative trauma injury.

Defendant has raised notice under Iowa Code 85.23 as a defense. Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is
alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. *Dillinger v. City of Sioux City*, 368 N.W.2d 176 (Iowa 1985); *Robinson v. Department of Transp.*, 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. *DeLong v. Highway Commission*, 229 Iowa 700, 295 N.W. 91 (1940).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant’s employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001); *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824 (Iowa 1992); *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368 (Iowa 1985).

Mr. Joya credibly testified he received care from Swift’s occupational health department, so the defendants’ had actual notice of Mr. Joya’s work-related shoulder injury. Further, Mr. Joya continued to work with his shoulder problems. He would receive very conservative care from occupational health. While the claimant knew he had problems with his shoulders, he did not know the seriousness of the injury until Dr. Shudar diagnosed and recorded the problem in May 2010. (Ex. 1, p. 7) The defendant had notice of the injury.

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

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

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.
Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935).


Mr. Joya has limited work experience of unskilled manual labor. His work in El Salvador was some farming. There is no record of him being a supervisor or having skills for non-manual labor. He has limited English ability.

Mr. Davis provided the only vocational evidence in the record and opined Mr. Joya's ability to obtain employment has been eliminated.

Having considered the above and all factors of industrial disability, it is determined that claimant is currently permanently and totally disabled. The parties stipulated at the time of the work injury, claimant’s gross weekly earnings were $616.68 and claimant was married and entitled to three exemptions. Claimant is entitled to permanent total disability benefits at the rate of compensation of $428.35

Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee’s choice where an employer-retained physician has previously evaluated “permanent disability” and the employee believes that the initial evaluation is too low. A rating of no impairment is a rating of impairment for section 85.39 purposes. Vaughn v. Iowa Power Inc., IC No. 925283 (Arb. Dec. 1992). The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee’s attending the subsequent examination. A section 85.39 evaluation is reimbursable irrespective of whether claimant establishes that the claimed injury arose out of and in the course of employment. Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa App. 2008).

The Iowa Supreme Court has ruled that the plain reading of section 85.39 limits an injured worker to one IME, regardless of the number of rating examinations obtained by the employer or its insurance carrier. Larson Manufacturing Company, Inc. v. Thorson, 763 N.W.2d 842, (Iowa 2009).


In this case, Dr. Stoken performed her IME on August 25, 2011. Dr. Neff did not perform his IME until October 26, 2011. Mr. Joya ended his employment with Swift due to his recurrent pneumonia and other non-work-related impairments. There does not appear to be a rating or a report of a defendant retained physician that creates an inference that the claimant had no
permanent impairment related to the injury. The claimant has failed to show entitlement to reimbursement for Dr. Stoken’s IME. No award is made for this IME.

The claimant has requested reimbursement of costs for the vocational report performed by Mr. Davis. (Ex. 8, p. 42)

876—4.33(86) Costs. Costs 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors’ or practitioners’ reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers’ compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost.

Costs are to be assessed at the discretion of the deputy commissioner or workers’ compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

The commissioner has ruled that prior $150.00 limitation was not applicable for the cost of a doctor or practitioner’s report.

While a doctor or practitioner deposition testimony is limited by Iowa Code section 622.69 and 622.72, no such limitation is contained in this rule for obtaining written reports, nor is there any application of those statutes to written reports. As recently instructed by the Iowa Supreme Court, this agency cannot ignore the plain working of its own rules. *Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142 (Iowa, 2009); *Rock v. Warhank*, 757 N.W.2d 670, 673 (Iowa 2008). Therefore, the prior agency precedent set forth above shall no longer be controlling agency precedents in cases before this agency and the entire reasonable costs of doctor and practitioner’s reports may be taxed as costs pursuant to 876 IAC 4.33.

*Smith v. Monsanto* File No. 1254092 (App. October 21, 2009)

Previous agency decisions limiting recovery of the costs of practitioner reports to $150.00 pursuant to our rule 876 IAC 4.33 are no longer valid. The reasonable fees charged to obtain such reports are now fully reimbursable. *Caven v. John Deere Dubuque Works*, File Nos. 5023051 & 5023052 (App. July 21, 2009). Our administrative rule 876 IAC 4.17 defines practitioner reports to include reports from persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation. Costs of $1,125.95 for the vocational report are awarded.
The last issue is whether Mr. Joya is entitled to medical care treatment for his shoulders’ conditions. The claimant has established that these conditions are causally related and the employer is required pursuant to Iowa Code section 85.27 to provide care that is reasonably necessary to treat this injury. The defendants shall provide treatment. No specific treatment is ordered at this time. It is assumed the defendants shall provide reasonable care. An alternate care petition can be filed if there is a dispute as to care in the future.

ORDER

THEREFORE IT IS ORDERED:
That defendants are to pay unto claimant permanent total disability benefits at the rate of hundred twenty-eight and 35/100 dollars ($428.35 per week during the period of his disability commencing December 12, 2009.

Defendants shall pay accrued weekly benefits in a lump sum.
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
Defendants shall provide reasonable medical care for the shoulder injuries.
Defendants shall file subsequent reports of injury filed as directed by the agency.
Defendant shall pay the cost of the vocational report.
Costs of this action are taxed to the defendant pursuant to rule 876 IAC 4.33.

Signed and filed this 16th day of May, 2012.

__________________________________
JAMES F. ELLIOTT
DEPUTY WORKERS’ COMPENSATION COMMISSIONER
Pursuant to Iowa Code sections 86.24 and 17A.15 the Chief Deputy Workers’ Compensation Commissioner affirms and adopts as final agency action those portions of the proposed decision in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

To the extent that claimant has alleged an occupational disease, she has not shown by a preponderance of the evidence that she sustained an occupational disease.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 14(f).

Iowa workers’ compensation law distinguishes occupational diseases from work injuries. An occupational disease is a disease which arises out of and in the course of the employee’s employment. The disease must have a direct causal connection with the employment and must follow as a natural incident from injurious exposure occasioned by the nature of the employment. While the disease need not be foreseeable or expected, after its contraction, it must appear to have had its origin in a risk connected with the employment and to have resulted from that risk. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of the occupation is not a compensable occupational disease.

The claimant need meet only two basic requirements to prove causation of an occupational disease. First, the disease must be causally related to the exposure to the harmful conditions in the field of employment. Second, the harmful conditions must be more prevalent in the
employment than in everyday life or other occupations. Iowa Code section 85A.8; *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980).

Where an employee is injuriously exposed to hazardous conditions producing occupational disease while employed by several successive employers, the employer where the employee was last injuriously exposed is liable for the total disability. *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428 (Iowa 1984).


In the arbitration decision, the deputy determined that the opinions of Drs. Shippen, Gallagher and Tranel were more persuasive than those of Drs. Moline and Fuortes. Claimant failed to offer persuasive medical evidence to support her claim that her exposure to lead caused her psychological and physical conditions.

With respect to a claim under Iowa Code section 85A, claimant has also failed to carry her burden of proof. The greater weight of the expert evidence supports a finding that although claimant was exposed to lead in the workplace, the objective findings do not support a causal connection between the exposure and her psychological and physical conditions.

Additionally, claimant was not disabled by any conditions she has alleged were related to lead exposure at the plant. Claimant's social security disability was awarded based on diabetes and hypertension.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 16th day of August, 2001.

____________________________________
PATRICIA J. LANTZ
CHIEF DEPUTY WORKERS’ COMPENSATION COMMISSIONER
Exhibit D
Aggravation of a Pre-Existing Condition

BEFORE THE IOWA WORKERS’ COMPENSATION COMMISSIONER

______________________________________________________________________

SHERRY MANLEY,

Claimant,

vs.

File No. 5008733

LUTHERAL HONES-MUSCATINE,

APPEAL

Employer,

DECISION

and

IOWA LONG TERM CARE RISK
MANAGEMENT ASSOCIATION.       Head Note Nos.: 1402.30, 2206

Insurance Carrier,

Defendants.

______________________________________________________________________

Pursuant to Iowa Code sections 86.24 and 17A.15 I affirm and adopt as final agency action those portions of the proposed decision in this matter that relate to issues properly raised on intra-agency appeal with the following additional analysis:

The deputy expressly found claimant to not be credible. In view of his ability to observe the demeanor of witnesses I defer to that finding. Claimant’s daughter would not necessarily know if claimant fell on stairs at a time when she was not present. The fact that claimant’s daughter fell on stairs would not prevent claimant herself from falling on stairs. The most material evidence, however, is that no physician felt that making beds would produce a rotator cuff tear.

The concept of injury by aggravating a pre-existing condition is sometimes misunderstood. Not every type of aggravation creates liability on the part of the employer. When a person has a torn rotator cuff, merely placing the affected shoulder and arm into certain positions will produce discomfort or pain. That can be said to aggravate the pre-existing condition but it is more properly described as merely manifesting the fact of the pre-existing condition. When a so-called aggravation is merely the manifestation of the pre-existing condition it does not constitute an injury by aggravation and does not create liability on the part of the employer. A compensable aggravation injury is more than something that merely creates a transitory increase in symptoms that are inherent with the pre-existing condition.

The shoulder and arm positions used to make a bed could readily produce pain. That fact manifests the pre-existing condition but does not create a compensable aggravation injury. For claimant to recover she needed to prove that the aggravation worsened her condition and brought about a need for surgery that did not previously exist. She failed to carry that burden of proof.
Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 11th day of February, 2005.

_______________________________________
MICHAEL G. TRIER
WORKERS’ COMPENSATION
COMMISSIONER
IN THE COURT OF APPEALS OF IOWA

No. 3-401 / 02-1479

Filed October 15, 2003

WILLIAM VOKES,

Petitioner-Appellant/Cross-Appellee,

vs.

AMERICAN HOME PRODUCTS a/k/a FORT DODGE ANIMAL HEALTH and PACIFIC EMPLOYERS INSURANCE COMPANY,

Respondents-Appellees,

FORT DODGE ANIMAL HEALTH f/k/a SOLVAY ANIMAL HEALTH and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA / AIG,

Respondents-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

William Vokes appeals from the district court’s decision affirming the industrial commissioner’s denial of Vokes’s claim for occupational disease disability benefits. Solvay appeals from that portion of the district court’s decision remanding the issue of its liability for Vokes’s medical expenses to the commissioner. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Pamela J. Walker of Sherinian & Walker, P.C., West Des Moines, for appellant.

Charles E. Cutler of Cutler Law Firm, P.C., West Des Moines, for appellees.

William D. Scherle of Hansen, McClintock & Riley, Des Moines, for appellees/cross-appellants.

Heard by Huitink, P.J., and Vaitheswaran and Eisenhauer, JJ.

HUJTINK, P.J.

I. Background Facts and Proceedings
William Vokes is currently employed as a stationary engineer for American Home Products. As a stationary engineer, Vokes works with pumps, pipes, and other plumbing and mechanical equipment. As a result, Vokes has had substantial exposure to asbestos.

Vokes has worked at the same plant since 1964. Prior to American Home’s purchase of the plant on March 5, 1997, the plant was owned by Solvay Animal Health.

Vokes filed claims for benefits in 1997 and 1999 under the Iowa Occupational Disease Law, Iowa Code chapter 85A (1999), claiming he was disabled as the result of his exposure to asbestos.

A deputy workers’ compensation commissioner determined Vokes was not disabled because he was not actually incapacitated from performing his work. The deputy found:

Although Vokes has a functional loss in terms of energy and endurance, he has no medical activity restrictions, and has not shown that he is "actually incapacitated" from earning equal wages in other suitable employment. In short, he has not reached the point of "disablement." It follows that he is not entitled (yet, anyway) to permanent partial disability benefits.

The deputy also found that Vokes failed to show he was last injuriously exposed to asbestos in the four months between the change of ownership in March 1997 and the date of his first disputed medical expenses, in July 1997. The deputy concluded Vokes was not entitled to compensation. The chief deputy workers’ compensation commissioner adopted the deputy’s decision as the final agency action in this case.

On judicial review, the district court affirmed the commissioner in all respects. The court, however, remanded to the commissioner to determine whether Vokes’s last injurious exposure to asbestos occurred while he worked for Solvay. The court noted if that were the case, Solvay would be responsible for paying Vokes’s medical expenses.

Vokes appeals, claiming he is disabled and the commissioner erred by concluding otherwise. In the alternative, he claims he is at least entitled to medical benefits. Solvay cross-appeals, claiming the district court erred by remanding to the commissioner for a determination of whether Vokes’s last injurious exposure was at Solvay.

II. Standard of Review

Our review under chapter 17A (2001) is for the correction of errors at law, not de novo. Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 498 (Iowa 2003). Our review is guided by section 17A.19(10). The district court, as well as this court, is bound by the commissioner’s factual findings if they are supported by substantial evidence. IBP, Inc. v. Harpole, 621 N.W.2d 410, 414 (Iowa 2001). We consider all of the evidence in the record. Dawson v. Iowa Bd. of Med. Exam’rs, 654 N.W.2d 514, 518 (Iowa 2002). Evidence is not insubstantial merely because it would have supported contrary inferences. Wal-Mart Stores, 657 N.W.2d at 499.

III. The Merits

An employee who has become “disabled from injurious exposure to an occupational disease” is entitled to compensation. Iowa Code § 85A.5 (1999). Disablement arises “where an
employee becomes actually incapacitated from performing the employee’s work or from earning equal wages in other suitable employment because of an occupational disease . . . .” Iowa Code § 85A.4. The statute also provides:

If, however, an employee incurs an occupational disease for which the employee would be entitled to receive compensation, if the employee were disabled as provided herein, but is able to continue in employment and requires medical treatment for said disease, then the employee shall receive reasonable medical services therefore.

Iowa Code § 85A.5. The employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation. Iowa Code § 85A.10.

A. Disablement

Vokes claims he is disabled within the meaning of section 85A.4. In Frit Industries v. Langenwalter, 443 N.W.2d 88, 91 (Iowa Ct. App. 1989), we stated, “[a]n employee need not work in an atmosphere until the most severe stage of an occupational disease is reached before he can seek relief under chapter 85A.” Langenwalter was accordingly awarded workers’ compensation benefits, even though he did not have any permanent physical disablement as a result of lead poisoning. Frit Indus., 443 N.W.2d at 91. Vokes accordingly argues he need not prove physical inability to work. It is sufficient, he claims, to show that he cannot perform all of his job duties and that his earning capacity has been diminished.

As noted above, “disablement” under section 85A.4 arises when an employee becomes actually incapacitated from performing the employee’s work, or from earning equal wages in other suitable employment. Noble v. Lamoni Prods., 512 N.W.2d 290, 293 (Iowa 1994). Langenwalter was not employed and was unable to find new employment. Frit Indus., 443 N.W.2d at 91. He was accordingly considered disabled because he had suffered a “loss in earning capacity proximately caused by an occupational disease under chapter 85A.” Id. (quoting Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980)). Contrary to Vokes’s assertion, Frit Industries is not controlling, and he cannot be considered disabled without proof that he is incapacitated and suffered a reduction in earning capacity.

Our review of the record discloses substantial evidentiary support for earlier quoted findings of fact by the commissioner. Vokes continues to work without restrictions or reduction in earnings. The commissioner was also free to accept or reject Vokes’s evidence that he was unemployable elsewhere for at least the same compensation. The commissioner, based on this record, correctly concluded Vokes failed to prove he “was unable to continue working for reasons related to his disease.” See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). We accordingly affirm the commissioner’s decision denying Vokes disability benefits under section 85A.4.

B. Medical Benefits

Vokes alternatively contends he is entitled to medical benefits under section 85A.5. He asserts the commissioner improperly required him to establish a specific date for this last injurious exposure to asbestos as a prerequisite to recovering for medical benefits. On cross-
appeal, Solvay claims the district court erred by remanding the case to the commissioner to determine whether Vokes’s last injurious exposure to asbestos occurred while employed by Solvay.

The undisputed record indicates Vokes suffers from an occupational disease, but is nevertheless able to continue working without restriction. He requires medical treatment for his disease, and under section 85A.5 should be entitled to receive compensation for reasonable medical services. The remaining issue then is which employer should be responsible for payment. Under section 85A.10, “the employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation.”

Our supreme court has stated:

Isolating and proving the particular period of employment that caused a claimant’s occupational disease may be extremely difficult if the claimant was exposed to the same hazardous conditions while employed with various employers. The reason for this is that clinical manifestations of occupational diseases are typically caused by prolonged exposure to hazardous substances.

To overcome this problem of proving causation in the occupational disease context, chapter 85A identifies the employer who shall be held accountable. Section 85A.10 imposes liability upon the last employer in whose employment the claimant was injuriously exposed to the hazardous condition of employment. It does not require that the claimant prove that his disease was actually caused by that exposure. Rather, we believe it is sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at his last employer’s place of employment.

*McSpadden*, 288 N.W.2d at 188 (citations omitted).

The commissioner and the district court interpreted section 85A.10 to mean the last injurious exposure before the date the employee first incurred medical expenses. Generally, we consider the last injurious exposure before the date of disability. *Doerfer Div. of CCA v. Nicol*, 359 N.W.2d 428, 433 (Iowa 1984); *Croft v. John Morrell & Co.*, 451 N.W.2d 501, 503 (Iowa Ct. App. 1989). Once the date of disability is determined, “the determination of which insurer is liable is accomplished by simply searching backwards to find the last time the claimant was exposed to the disease-causing substance, subject, of course to the jurisdiction’s rules on the degree of exposure required.” *Doerfer Div.*, 359 N.W.2d at 433; see also 9*Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law* § 153.02(6)(a) at 153-11 (2002). Put another way, the date of the last injurious exposure can never come after the date of the disability. *CES Card Establishment Servs., Inc. v. Doub*, 656 A.2d 332, 338 (Md. 1995).

In the present case, however, Vokes is not disabled. A similar situation was discussed in *State Accident Insurance Fund Corp. v. Carey*, 662 P.2d 781, 782 (Or. 1983), where the court held, “the most logical triggering event in the case of a non-disabling injury or disease is the date when medical treatment is first sought.” The court noted that the date when an employee first seeks medical treatment “has some objective relationship to the date when the claimant’s
condition became a disability, because it is usually documented." State Accident Ins. Fund, 662 P.2d at 782. We determine the commissioner properly interpreted section 85A.10 to mean the last injurious exposure before the date the employee first incurred medical expenses as a result of the occupational disease.

While we agree with the commissioner’s recitation of the last injurious exposure rule, we find the commissioner’s application of the rule was not supported by substantial evidence. The commissioner found Vokes was exposed to loose, friable asbestos both before and after the sale of the plant in March 1997. The commissioner went on to conclude:

   In the present case, it is clear that asbestos was present in the Labs at all times relevant—but Vokes was not “injuriously exposed” on a daily basis. Rather, he at times touched or stepped on loose, friable asbestos, which then became airborne and subject to respiration. Vokes testified credibly to a number of such incidents, but cannot supply the date of any one occurrence.

   Whether any such “injurious exposures” occurred in the four months between the last change of ownership and the first disputed medical expenses is purely a matter of speculation. The evidence offered does not permit a finding one way or the other. For that reason, it must be concluded that Vokes has failed to meet his burden of proof on the issue.

After finding that Vokes was injuriously exposed to asbestos both before and after the change of ownership, the commissioner determined Vokes was not entitled to the payment of medical expenses because he was unable to supply a specific date when he was exposed.

While Vokes was unable to supply a specific month and date for the incidents when he was exposed to asbestos, he was able to give general time frames, such as summer of 1998. In regard to some incidents, he was able to relate who the supervisor was at that time, which would indicate whether American Home or Solvay was the owner. We determine that for purposes of determining Vokes’s last injurious exposure, it should be sufficient if the commissioner is able to determine who was the owner at the time of the incident. Application of the last injurious exposure rule does not require Vokes to give a specific month and date.

We note that the primary purpose of the workers’ compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit. McSpadden, 288 N.W.2d at 188. We interpret the workers’ compensation law “as will best serve the interests of employees who suffer from an occupational disease, rather than attempt an adjustment of their rights in the light of equities that may exist between [successive employers].” Doerfer Div., 359 N.W.2d at 434 (quoting Wilson v. Van Buren County, 278 S.W.2d 685, 688 (Tenn. 1955)). An employee’s claim should not be consigned to the sidelines while two employers stage a lengthy fight over apportionment or responsibility. Id.

We determine the case should be remanded as to both American Home and Solvay for a determination of Vokes’s last injurious exposure prior to July 1997, when he first incurred medical expenses as a result of the occupational disease.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
Appeal of the Decision and Order and Modified Decision and Order Awarding Benefits on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Daniel F. Horne (Stone and Horne, L.L.P.), Corpus Christi, Texas, for claimant.

John C. Elliott and James C. Woolsey (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Modified Decision and Order Awarding Benefits on Reconsideration (2010-LHC-00230) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the administrative law judge’s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); O’Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).
Claimant sustained a lower back injury on February 15, 2006, while shoveling raw bauxite onto an underground cross-tunnel conveyor belt at employer’s Sherwin Alumina facility, which is located on the Texas Gulf Coast. The primary purpose of employer’s facility is to extract aluminum oxide (alumina) from bauxite ore. The raw bauxite is unloaded from vessels at Dock 5 of employer’s deep water port to the storage building by means of an overhead conveyor system. The overhead conveyor system carries the raw material over a street and fence separating the dock area from the alumina processing facility and dumps it into discreet piles according to grade in Building 15. Once a particular grade of raw bauxite is selected for the extraction process, it falls through one or more of 60 trap doors into an underground area referred to as the reclaim system. Once in the reclaim system, the raw bauxite passes through a screw feeder which sifts the rocks and bigger clumps of bauxite into a fine powder and then drops it onto the reclaim conveyor belt, which then, in turn, transports and drops the material onto the cross-tunnel conveyor. The cross-tunnel conveyor belt, which is approximately 25-30 feet underground, transfers the pre-sifted, pre-blended bauxite to the rod mill, where the material is further pulverized as part of the manufacturing process. Often, some bauxite spills off the cross-tunnel conveyor onto the floor of the cross-tunnel area, thereby requiring workers, like claimant, to intermittently shovel the spilled bauxite back onto the cross-tunnel conveyor belt. It is in the course of this particular assignment underneath Building 15 that claimant sustained his injury. Once at the rod mill, the bauxite proceeds through the remaining steps in the manufacturing process whereby the alumina is extracted. The finished product is stored and eventually loaded and delivered from the facility either by rail car or ship (Dock 90).

On the day of his injury, claimant stated that while performing the cleanup work in the cross-tunnel, he felt something pop in his lower back. He went to employer’s medical clinic and thereafter sought treatment from Dr. Walker, a chiropractor. On February 17, 2006, Dr. Walker released claimant to return to work with restrictions and claimant performed light-duty work for employer until March 31, 2006.1 Claimant did not work again until he obtained a position as a warehouse safety coordinator at Wendland Air Conditioning and Heating (WACH) in Portland, Texas, on May 22, 2009, a position he continued to hold as of the date of the hearing.

Claimant subsequently filed a claim seeking benefits under the Act.2 In his decision, the administrative law judge found that claimant’s injury occurred on a covered situs. 33 U.S.C. §903(a). On the merits, the administrative law judge found that claimant was unable to return to his usual employment until May 6, 2010, the date he was released to return to regular duty by Dr. Likover. As employer presented no evidence regarding the availability of suitable alternate employment during this time frame,3 the administrative law judge concluded that claimant is entitled to temporary total disability benefits from February 15, 2006, to July 31, 2006, permanent total disability benefits from July 31, 2006, to May 6, 2010, and that he suffered no disability from that point forward. 33 U.S.C. §908(a), (b). The administrative law judge also awarded claimant medical benefits under Section 7, 33 U.S.C. §907. On reconsideration, the administrative law judge rejected employer’s argument that he erred by rejecting the parties’ stipulation that claimant suffered no permanent disability. The administrative law judge, however, found that claimant’s work with WACH constituted suitable alternate employment. He, thus, modified his decision to reflect claimant’s entitlement to permanent partial rather than permanent total disability benefits from May 22, 2009, to May 6, 2010. 33 U.S.C. §908(c)(21), (h).

On appeal, employer challenges the administrative law judge’s findings that claimant established he was injured on a covered situs and is thus covered by the Act, as well as his
rejection of the parties' stipulation that claimant suffered no permanent disability as a result of his work injury. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding that claimant established the situs element pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). In support of its contention, employer argues that the cross-tunnel is physically separated from the docks by several hundred yards, it is 25-30 feet underground, and is devoted solely to transferring bauxite from one phase of the manufacturing process to the next without regard to whether a vessel is at the dock. Thus, employer avers that this area serves no functional role in the loading and/or unloading process. Employer further argues that the Board’s decision in Gavranovic v. Mobil Mining & Minerals, 33 BRBS 1 (1999), is factually distinguishable from this case and thus, does not, in contrast to the administrative law judge’s finding, support the conclusion that the cross-tunnel is a covered situs.

For a claim to be covered by the Act, a claimant must establish that his injury occurred on a site described in Section 3(a) and that he is a maritime employee under Section 2(3) of the Act. 33 U.S.C. §§902(3), 903(a); Director, OWCP v. Perini North River Associates, 459 U.S. 297, 15 BRBS 62(CRT) (1983); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 11 BRBS 320 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate coverage under the Act, a claimant must satisfy both the “situs” and “status” requirements. 4 Section 3(a) states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a); Texports Stevedoring Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In this case, as claimant was not injured on navigable waters or on an enumerated site, his injury must have occurred in an “other adjoining area customarily used by an employer” in loading or unloading a vessel. 33 U.S.C. §903(a); Charles v. Universal Ogden Services, 37 BRBS 37 (2003); Stratton v. Weedon Engineering Co., 35 BRBS 1 (2001)(en banc); Stroup v. Bayou Steel Corp., 32 BRBS 151 (1998); Melerine v. Harbor Constr. Co., 26 BRBS 97 (1992).

Where a facility is used for both maritime and non-maritime functions, case precedent recognizes that there is a point at which the loading and unloading process ceases, and the manufacturing process begins and vice versa. Dryden v. The Dayton Power & Light Co., 43 BRBS 167 (2009); Stroup, 32 BRBS 151; Melerine, 26 BRBS 97. The inquiry in “mixed-use cases,” i.e., those involving a site with both a manufacturing and a maritime component, concerns whether the claimant’s injury occurred in the area used for loading or unloading vessels, as that area has a functional relationship with navigable water. See Bianco v. Georgia Pacific Corp., 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), aff’g 35 BRBS 99 (2001); see also D.S. [Smith] v. Consolidation Coal Co., 42 BRBS 80 (2008), aff’d sub nom. Consolidation Coal Co. v. Benefits Review Board, 629 F.3d 322, 44 BRBS 101(CRT) (3rd Cir. 2010); Maraney v. Consolidation Coal Co., 37 BRBS 97 (2003); Dickerson v. Mississippi Phosphates Corp., 37 BRBS 58 (2003); Jones v. Aluminum Co. of America, 35 BRBS 37 (2001).
In addressing situs, the administrative law judge found that this case is analogous to Gavranovic, 33 BRBS 1, since the area where claimant sustained his injury, *i.e.*, the cross-tunnel under Building 15, is linked to the unloading process at the dock. The administrative law judge found particularly significant to this case, the Board’s statement, in Gavranovic, that “[i]n light of the location of employer’s facility [the Board observed that the entire facility and the building in question are adjacent to navigable water and to the docks where barges are loaded and unloaded] and because significant maritime activity (loading and unloading barges) occurs on the docks at employer’s facility . . . claimants’ injuries . . . occurred on a covered situs.” Decision and Order at 18 quoting Gavranovic, 33 BRBS at 5. In this case, the administrative law judge found that vessels with the raw material, bauxite, are unloaded at employer’s dock and transferred via conveyor belt to employer’s storage shed, *i.e.*, Building 15, which is the building in which claimant’s injury occurred. The administrative law judge therefore concluded that claimant was injured on a covered situs even though he may not have been engaged in maritime employment at the time of injury.

In Gavranovic, the claimants worked as operators for a fertilizer manufacturer. Both claimants were injured while working in a building used to store fertilizer. From this particular building, which was adjacent to navigable water and in proximity to the docks, fertilizer was either transferred to another building, from which it was transported by conveyor belt to barges at the dock, or it was loaded onto trucks or railcars. The administrative law judge found that the building where the injuries occurred and the dock were not separate and distinct areas and thus concluded it was an “adjoining area.” The Board affirmed the administrative law judge’s determination that the building was a covered situs. The building where the injury occurred was not used in the manufacturing process and was linked to another building in which the loading process occurred. Gavranovic, 33 BRBS at 2, 4-5.

In Dickerson, in contrast, the Board held that a phosphoric acid plant, although located within a port facility, was not an “adjoining area” under the Act because it was geographically and functionally separate from the docks. That is, it was not connected to the docks by conveyor belt or any other means, and it was solely used in the manufacturing process and had no relationship to customary maritime activity. Dickerson, 37 BRBS at 62. The Board distinguished Gavranovic from Dickerson because the building in which the Gavranovic claimants were injured was used to store fertilizer products awaiting transshipment by vessel, the building was near navigable water, and the building was connected to the docks by conveyor belts. Dickerson, 37 BRBS at 63; see also Uresti v. Port Container Industries, Inc., 33 BRBS 215 (Brown, J., dissenting), aff’d on recon., 34 BRBS 127 (Brown, J., dissenting) (2000) (warehouse located in port and used to store cargo after it was unloaded from ships prior to entering stream of land transportation is covered as the storage facility is part of the overall process of unloading). Because the plant in Dickerson was not connected to the docks and did not house products arriving from or destined for vessels, it was not a covered situs. Dickerson, 37 BRBS at 63.

In Bianco, 304 F.3d 1053, 36 BRBS 57(CRT), the United States Court of Appeals for the Eleventh Circuit held that a claimant who was injured in the production departments of a gypsum production plant, adjacent to the navigable Turtle and East Rivers, is not covered by the Act. The court rejected the claimant’s arguments that the entire facility should be considered covered because maritime activity occurred in another area of the plant where the raw gypsum was unloaded from vessels. The court declined to expand coverage, concluding that, were it to hold the entire facility covered, “irrespective of what [the employer] does at different areas therein[,]” it “would effectively be writing out of the statute the requirement that the adjoining
area “be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT).

In *Dryden*, 43 BRBS 167, the claimant was injured at an outdoor site located within a conveyor belt system and between employer's power plant and the Ohio River. Coal was unloaded from river barges and transported by conveyor belts from the barges to the plant. The Board held that the claimant was injured within the part of employer’s facility used for unloading coal and thus, in an “adjoining area.” Specifically, the Board noted that the claimant’s injury within the vicinity of employer’s conveyor belt system was in an area used for a maritime activity, the unloading of coal barges, and not within the electricity generating area of employer’s facility. Moreover, the Board noted that the outdoor area of employer’s conveyor belt system has a functional relationship with the Ohio River, as it is adjacent to the river, and is customarily used for the maritime activity of unloading coal from barges. Stating that there is no basis in the existing law for apportioning this conveyor unloading system outside of the power plant into covered and uncovered situses, the Board affirmed the administrative law judge's finding that the site of the claimant’s injury is an “adjoining area” under Section 3(a) and his finding of coverage under the Act, notwithstanding his erroneous finding that the entire facility is a covered situs.

The issue in this case is whether claimant was injured in an area that has a functional relationship with navigable waters, such that it is an “adjoining area.” The administrative law judge’s reliance on *Gavranovic* in this case is appropriate given that the record establishes that no manufacturing takes place in the building where claimant was injured. HT at 93-94. Moreover, claimant submitted an aerial photograph of part of employer’s facility which shows bauxite being off-loaded from the docks via the overhead conveyor belt to the storage shed building, as well as the location of claimant’s injury in a tunnel under this building. CX 1. This photograph shows that the storage shed building is connected to the docks by a conveyor belt; it also shows that the area in which claimant sustained his injury, i.e., the cross-tunnel conveyor belt, is directly beneath the storage shed building in which the off-loaded bauxite is delivered. The photograph supports the administrative law judge’s finding that there is a functional nexus between the docks and the building in which claimant’s injury occurred. See *Dryden*, 43 BRBS 167.

We affirm the administrative law judge’s finding that the storage shed building constitutes an adjoining area pursuant to Section 3(a) of the Act. The building adjoins navigable waters, is connected to the docks by conveyor belts, and is used in furtherance of employer’s unloading process; the building is not used for manufacturing. *Dryden*, 43 BRBS 167. On these facts, the building has a functional relationship with navigable waters and the administrative law judge rationally found this case analogous to *Gavranovic* and, hence, that claimant’s injury occurred on a covered situs. Consequently, as claimant was injured in an area adjoining navigable waters customarily used for unloading barges, he was injured on a covered situs. *Winchester*, 632 F.2d 504, 12 BRBS 719. Therefore, we affirm the administrative law judge’s finding that claimant’s injury is within the coverage of the Act. *Uresti*, 33 BRBS 215; *Gavranovic*, 33 BRBS 1.

Employer next contends the administrative law judge erred in failing to inform the parties that their stipulation that claimant suffered no permanent disability would be rejected. The parties submitted joint stipulations which were approved at the formal hearing by the administrative law judge. The stipulation included the statement: “9. Permanent disability: No Percentage: N/A.” JX 1; HT at 9. In his initial decision, the administrative law judge, however, rejected this stipulation, finding that an impairment rating is not relevant in terms of determining disability in this case.
involving an unscheduled back injury and that the stipulation is otherwise not supported by the record.

Decision and Order at 23. With regard to the latter rationale, the administrative law judge found that the evidence supports the conclusion that, post-injury, claimant was unable to work at anything but sedentary employment until he was examined by Dr. Likover on May 6, 2010, who stated that claimant was capable of returning to regular duty work as of that date. The administrative law judge observed that although Dr. Taxis opined that claimant should be able to return to work at regular duty in 2006, his release was limited, as the physician stated claimant could return to work only if there was no excessive stress to claimant’s lumbar spine. The administrative law judge also credited the opinions of claimant’s treating physicians, Drs. Walker and Masciale, who limited claimant to light duty or sedentary work throughout the relevant period of time up until May 6, 2010. The administrative law judge thus concluded that, since employer did not submit evidence of suitable alternate employment for periods prior to May 6, 2010, claimant is entitled to permanent total disability benefits from July 31, 2006 to May 6, 2010. Id. at 24.

Employer filed a motion for reconsideration of the administrative law judge’s rejection of the stipulation. The administrative law judge provided the parties an opportunity to further develop the record on the issue of claimant’s permanent disability. In his decision on reconsideration, the administrative law judge reiterated his decision to reject the parties’ stipulation that claimant suffered no permanent disability as a result of his work injury. Decision and Order on Reconsideration at 6. The administrative law judge found that the stipulation is not supported by the evidence and that claimant was unable to return to his usual work until May 6, 2010. As claimant obtained work at WACH on May 22, 2009, the administrative law judge awarded claimant permanent total disability from the date of maximum medical improvement, August 1, 2006 to May 21, 2009, and permanent partial disability for a loss of wage-earning capacity from May 22, 2009 to May 6, 2010.

Stipulations are binding upon the parties when they are received into evidence. 29 C.F.R. §18.51. As the administrative law judge correctly observed on reconsideration, he is not obligated to accept stipulations entered into by the parties, but if he rejects them, he must provide the parties with prior notice that he will not accept them, his rationale for doing so, and an opportunity to submit evidence in support of their positions. See Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245 (1989); Beltran v. California Shipbuilding & Dry Dock Co., 17 BRBS 225 (1985); Phelps v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 325 (1984). Although the administrative law judge erred originally by not providing the parties with notice and an opportunity to present evidence in support of the rejected stipulation, the administrative law judge corrected that error in response to employer’s motion for reconsideration. In this regard, the parties received notice of the administrative law judge’s rejection of the stipulation, as well as his explanation for taking such action, by virtue of his initial decision, and the administrative law judge, through the reconsideration process, provided employer the opportunity to develop evidence regarding the issue of claimant’s permanent disability.

Moreover, the administrative law judge rejected the stipulation for the legally correct reason that the absence of a permanent impairment rating does not establish the absence of disability within the meaning of the Act. See, e.g., Nardella v. Campbell Machine, Inc., 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); American Mutual Ins. Co. of Boston v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). Rather, disability is measured by both physical and economic results of the injury. Id.;
Moreover, the administrative law judge rationally found that the stipulation was not supported by the credited medical evidence of record as the physicians restricted claimant from performing his usual work until May 6, 2010. Employer has not established error in the administrative law judge’s rejection of the stipulation. We therefore affirm the administrative law judge’s rejection of the parties’ stipulation that claimant sustained no permanent disability. As there is no substantive challenge to the administrative law judge’s award of benefits, and as it is supported by substantial evidence, it is affirmed.

Accordingly, the administrative law judge’s Decision and Order and Modified Decision and Order Awarding Benefits on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

ENDNOTES

1. Dr. Masciale diagnosed claimant, on April 25, 2006, with internal disc derangement with a posterior annular tear, recommended lumbar epidural steroid injections, and released claimant to work light duty. Dr. Masciale subsequently performed an L4 laminectomy, radical discectomy and fusion on March 5, 2007.

2. Claimant received some benefits under the Texas workers’ compensation statute.

3. The administrative law judge observed that employer’s labor market survey was moot as it identified numerous sedentary and light duty jobs available for the time period of May 25, 2010, to June 3, 2010.

4. The administrative law judge’s finding that claimant satisfied the status requirement, as he spent at least some time in indisputably longshoring operations unloading vessels, is affirmed as it is in accordance with law and unchallenged on appeal. See 33 U.S.C. §902(3); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977); Scalio v. Ceres Marine Terminals, Inc., 41 BRBS 57 (2007).

5. As claimant was injured on a facility located adjacent to Corpus Christi Bay, a geographic nexus with navigable waters is established. See Texports Stevedoring Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Dryden v. The Dayton Power & Light Co., 43 BRBS 167 (2009). The issue, therefore, in this case is whether the site of injury has a functional relationship with navigable waters.
6. This statement is consistent with cases holding that employees whose duties are integral to a manufacturing process rather than to a longshoring or shipbuilding process are not engaged in maritime employment pursuant to Section 2(3) of the Act. See Coyne v. Refined Sugars, Inc., 28 BRBS 372 (1994); Garmon v. Aluminum Co. of America-Mobile Works, 28 BRBS 46 (1994), aff’d on recon., 29 BRBS 15 (1995).

7. Employer’s Legal and External Affairs Coordinator, Thomas B. Ballou, Jr., conceded that “the conveyor that runs down the top of the building [the storage sheds] is integral to offloading the ships.” HT at 96.

8. Additionally, the record contains testimony, noted by the administrative law judge, from claimant and Mr. Ballou, which bolsters the administrative law judge’s conclusion that claimant’s injury occurred on a covered situs. Claimant testified: that if the storage sheds became overloaded with bauxite, it could shut down the unloading process; that his work, including the shoveling of fallen bauxite back onto the cross-tunnel conveyor belt, “was always loading and unloading;” that the purpose of the area at the underground conveyor where his accident occurred is to feed the process plant from the storage shed; and that his job shoveling the bauxite in the underground cross-tunnel area assisted with the transfer of bauxite “to the process system.” HT at 31-37, 52. While Mr. Ballou stated that the reclaim conveyor system and the cross-tunnel conveyor “cannot be used to load or unload vessels,” he conceded it is “the only way of pulling [bauxite] out of storage [sheds] in order to send it to the other storage facility past building 24” where it awaits further processing in the rod mills. EX 15; HT at 97. Mr. Ballou added that, at least theoretically, if the cross-tunnel area was not routinely cleaned up and thus, left to fill with debris, employer could not offload any other vessels containing bauxite without pushing the bauxite outside and exposing it to the elements. HT at 103.

9. The administrative law judge, however, accorded diminished weight to Dr. Likover’s opinion that claimant should have been able to return to full-duty work in January or February 2008, following his surgery in March 2007, because the physician examined claimant only once, more than four years after the injury had occurred. Moreover, the administrative law judge found that Drs. Walker and Masciale’s opinions, limiting claimant to light-duty work, should be afforded the most weight since the record establishes that they are claimant’s treating physicians.

10. The administrative law judge granted employer thirty days to develop the issue of claimant’s permanent disability and employer submitted additional evidence consisting of the depositions of claimant and his present supervisor, Mark Wendland, and a vocational rehabilitation report and labor market survey dated March 3, 2011. Employer did not present any additional medical evidence. Rather, in its March 16, 2011, “Rejoinder Brief Regarding Post-Hearing Evidence,” employer argued that its motion for reconsideration should be granted, and that the evidence conclusively establishes claimant suffered no permanent disability.
Exhibit G
Tennessee Pain Management Bill

State of Tennessee
PUBLIC CHAPTER NO. 1100
SENATE BILL NO. 3315
By Johnson
Substituted for: House Bill No. 3372
By White
AN ACT to amend Tennessee Code Annotated, Title 29; Title 50, Chapter 6 and Title 56, relative to workers’ compensation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, § 50-6-102(17), is amended by deleting the subdivision in its entirety and by substituting instead the following language:
(17) "Utilization review" means evaluation of the necessity, appropriateness, efficiency and quality of medical care services, including the prescribing of one (1) or more Schedule II, III, or IV controlled substances for pain management for a period of time exceeding ninety (90) days from the initial prescription of such controlled substances, provided to an injured or disabled employee based on medically accepted standards and an objective evaluation of those services provided; provided, that "utilization review" does not include the establishment of approved payment levels, a review of medical charges or fees, or an initial evaluation of an injured or disabled employee by a physician specializing in pain management;

SECTION 2. Tennessee Code Annotated, Section 50-6-124, is amended by adding the following language as a new subsection (f):
(f) It is the intent of the general assembly to ensure the availability of quality medical care services for injured and disabled employees and to manage medical costs in workers’ compensation matters by eradicating prescription drug abuse through the employment of the system established by subsection (a) to review any healthcare provider prescribing one (1) or more Schedule II, III, or IV controlled substances for pain management to an injured or disabled employee for a period of time exceeding ninety (90) days from the initial prescription of such controlled substances.

SECTION 3. Tennessee Code Annotated, § 50-6-204, is amended by adding the following language as a new, appropriately designated subsection:
(1) If a treating physician determines that pain is persisting for an injured or disabled employee beyond an expected period for healing, the treating physician may either prescribe, if the physician is a qualified physician as defined in subdivision (2)(B), or refer, such injured or disabled employee for pain management encompassing pharmacological, non-pharmacological and other approaches to manage chronic pain.
(2)(A) In the event that a treating physician refers an injured or disabled employee for pain management, the employee is entitled to a panel of qualified physicians as provided in subdivision (a)(4) except that, in light of the variation in availability of qualified pain management resources across the state, if the office of each qualified physician listed on the panel is located not more than one hundred seventy-five (175) miles from the injured or disabled employee’s residence or place of employment, then the community requirement of subdivision (a)(4) shall not apply for the purposes of pain management.
For the purposes of the panel required by subdivision (2)(A), "qualified physician" shall mean an individual licensed to practice medicine or osteopathy in this state and: Board certified in anesthesiology, neurological surgery, orthopedic surgery, radiology or physical medicine and rehabilitation through the:

- American Board of Medical Specialties (ABMS);
- American Osteopathic Association (AOA);
- Another organization authorized by the commissioner;
- Board certified by an organization listed in subdivision (2)(B)(i)(a)-(c) in a specialty other than a specialty listed in subdivision (2)(B)(i) and who has completed an ABMS or AOA subspecialty board in pain medicine, or completed an Accreditation Council for Graduate Medical Education (ACGMA) accredited pain fellowship; or
- Serving as a clinical instructor in pain management at an accredited Tennessee medical training program.

The injured or disabled employee is not entitled to a second opinion on the issue of impairment, diagnosis or prescribed treatment relating to pain management. However, on no more than one (1) occasion, if the injured or disabled employee submits a request in writing to the employer stating that the prescribed pain management fails to meet medically accepted standards, then the employer shall initiate and participate in utilization review as provided in this chapter for the limited purpose of determining whether the prescribed pain management meets medically accepted standards.

As a condition of receiving pain management that requires prescribing Schedule II, III, or IV controlled substances, the injured or disabled employee may sign a formal written agreement with the physician prescribing the Schedule II, III, or IV controlled substances acknowledging the conditions under which the injured or disabled employee may continue to be prescribed Schedule II, III, or IV controlled substances and agreeing to comply with such conditions.

If the injured or disabled employee violates any of the conditions of the agreement on more than one (1) occasion, then:

- The employee's right to pain management through the prescription of Schedule II, III, or IV controlled substances under this chapter shall be terminated and the injured or disabled employee shall no longer be entitled under this chapter to the prescription of such substances for the management of pain;
- For injuries occurring on or after July 1, 2012, the violation shall be deemed to be misconduct connected with the employee's employment for purposes of § 50-6-241(d); and
- For injuries occurring on or after July 1, 2012, in the event such violation occurs prior to a finding that the injured or disabled employee is totally disabled as provided in § 50-6-207(4), through either a judgment or decree entered by a court following a workers' compensation trial or a settlement agreement approved pursuant to § 50-6-206, the incapacity to work due to lack of pain management shall not be considered when determining whether the injured employee is entitled to permanent total disability benefits as provided in § 50-6-207(4).

A physician may disclose the employee's violation of the formal written agreement on the physician's own initiative. Upon request of the employer, a physician shall disclose the employee's violation of the formal written agreement as provided in this section. The formal written agreement shall include a notice to the employee in capitalized, conspicuous lettering on the face of the agreement the consequences for violating the terms of the agreement as provided for in this subsection.

(E)(i) If an employer terminates an injured or disabled employee's right under this chapter to pain management through the prescription of Schedule II, III, or IV controlled substances pursuant to alleged violations of the formal agreement as provided in subdivision (4)(B), then the employee may either file a:
(a) Request for assistance pursuant to § 50-6-238, if the benefit review conference requirement has not been exhausted, and a workers' compensation specialist shall determine whether such violations occurred; or
(b) Petition in a court of proper jurisdiction as provided in § 50-6-225, if the benefit review conference requirement has been exhausted, for a determination of whether such violations occurred.
(ii) If an employer or insurer alleges that an injured or disabled employee is not entitled to reconsideration under § 50-6-241 (d) or permanent total disability benefits as provided in § 50-6-207(4) because of the employee's alleged violations of the formal agreement as provided in subdivision ( )(4)(B), then a court shall also determine whether such violations occurred.
(5) Prescribing one (1) or more Schedule II, III, or IV controlled substances for pain management treatment of an injured or disabled employee for a period of time exceeding ninety (90) days from the initial prescription of any such controlled substances is considered to be medical care services for the purposes of utilization review as provided in this chapter. The department is authorized to impose a fee for the administration of an appeal process for utilization review under this subdivision ( )(5) and subdivision ( )(3).

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect July 1, 2012, the public welfare requiring it, and shall apply to pain management, including the prescription of Schedule II, III, or IV controlled substances, prescribed on or after such date.

3 SENATE BILL NO.       3315
PASSED: May 1, 2012
SPEAKER
HOUSE OF REPRESENTATIVES