BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE HAYES, Claimant, vs. GEORGIA PACIFIC CORP., Employer, and OLD REPUBLIC INSURANCE, Insurance Carrier, Defendants.	File No. 5067990.02 REVIEW-REOPENING DECISION Headnotes: 1402.40; 1800; 1802; 1804; 2700; 4100

STATEMENT OF THE CASE

The claimant, Dale Hayes, filed a petition for review-reopening seeking workers' compensation benefits from Georgia Pacific, and its insurer, Old Republic Insurance. Mark Sullivan appeared on behalf of the claimant. Christopher Fry appeared on behalf of the defendants.

The matter came for hearing on March 23, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred electronically. The hearing proceeded without significant difficulty.

The record in this case consists of Claimant's Exhibits 1 through 6. As a sanction for noncompliance with an order of the undersigned, the record was closed to the defendants prior to the hearing. The claimant testified on his own behalf. Rachel Waterhouse was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record was held open for the receipt of three claimant's exhibits through May 2, 2022. The matter was fully submitted after receipt of the outstanding exhibits, and briefing by the parties on June 3, 2022.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injuries.

2. The claimant sustained an injury arising out of, and in the course of employment on March 15, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. The alleged injury is a cause of permanent disability.

5. That, although entitlement to temporary disability benefits cannot be stipulated, the claimant was off work from April 20, 2021, "until the issue of additional permanent benefits can be completed."

6. The March 15, 2018, injury caused the claimant to suffer an industrial disability.

7. That the commencement date for permanent partial disability benefits, if any are awarded, is October 1, 2021.

8. The claimant's gross earnings were seven hundred ninety-three and 60/100 dollars ($793.60) per week. At the time of the alleged injury, the claimant was single and entitled to one exemption. The result is a weekly compensation rate of four hundred eighty-four and 98/100 dollars ($484.98).

The defendants waived their affirmative defenses. Credits against any award are no longer in dispute.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant has proven the prerequisites to demonstrate he is entitled to review-reopening benefits under Iowa Code section 86.14.

2. Whether the claimant is entitled to temporary disability and/or healing period benefits during a running healing period from April 20, 2021, "until the issue of permanent benefits can be completed, once claimant completes current treatment."

3. The extent of permanent disability benefits, should any be awarded.

4. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

5. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

6. Whether an award of penalty benefits due to late payment of weekly benefits is appropriate.

7. Whether the claimant is entitled to a taxation of costs, and whether those costs were paid.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Dale Hayes, the claimant, was 56 years old at the time of the review-reopening hearing. (Testimony).

Mr. Hayes injured himself while working at Georgia Pacific. (Testimony). While working at Georgia Pacific, he worked sixty hours per week. (Testimony).

This case dates back to an injury to the claimant that arose out of, and in the scope of employment, on March 15, 2018. An arbitration hearing was held on August 6, 2020, and an arbitration decision was issued by the undersigned on September 29, 2020. The claimant was awarded a 10 percent industrial disability, with compensation to be paid at four hundred eighty-four and 98/100 dollars ($484.98) per week, and the defendants were ordered to reimburse the claimant for costs totaling fifty and 00/100 dollars ($50.00).

At the initial arbitration hearing, Mr. Hayes testified that he had lower back pain in the right side of his back that ranged between 3 and 10 out of 10. (Claimant's Exhibit 2:29). The claimant testified that bending, lifting and sometimes walking, caused his low back pain to flare. (CE 2:29). He also had tingling and sharp pain in his legs. (CE 2:29). He could not sit for more than 30 minutes before his back would stiffen. (CE 2:30). He could still maintain his lawn, but testified as to difficulty with shoveling snow due to his lower back pain. (CE 2:30). Mr. Hayes testified that he believed he would have difficulty performing a number of his previous jobs, which were physically demanding in nature. (CE 2:30). The opinions of Dr. Mark Taylor and Dr. Erin Kennedy were key to the arbitration decision. The decision stated:

> Dr. Taylor proposed permanent restrictions to include a 35 pound lifting limit up to waist level, 30 pounds between the waist and chest level, and 25 pounds or less below the knee level or above the chest level. Dr. Taylor also noted that Mr. Hayes should be able to alternate sitting, standing, and walking as needed for his comfort. Mr. Hayes could squat and bend occasionally, and could kneel occasionally to frequently. He could also travel occasionally, but would need the ability to stop and get out of the

> vehicle. Finally, Dr. Taylor indicated that Mr. Hayes could not tolerate the operation of equipment over particularly rough surfaces.

(CE 2:29, internal citations omitted). Dr. Kennedy allowed Mr. Hayes to work 8 hours per shift for 5 shifts per week until the floors at Georgia Pacific were replaced. (CE 2:27). Once the floors at Georgia Pacific were replaced, the claimant was to attempt working overtime. (CE 2:27).

The undersigned, noted in the arbitration decision:

> Mr. Hayes has a lengthy history of low back pain dating back to 1999. In July of 1999, Mr. Hayes complained of low back pain after lifting metal onto a table, which caused pain to the right side of his lower back. His back pain returned in July of 2001, and radiated into his right leg. There were no records of lower back pain reported until January of 2014, when the claimant noted lower back pain for several days. In October of 2014, Mr. Hayes again reported lower back pain on the right side present for the previous three weeks. Mr. Hayes told the provider that the lower back pain would come every two years. In March of 2015, Mr. Hayes reported low back pain that began one year earlier and worsened over the past few months. He indicated to the provider that he experienced years of lower back pain that would increase every six months. An injection to his lower back followed. In May of 2015, Mr. Hayes reported radicular low back pain into his right leg. An MRI performed showed a two level disk bulge with an annular tear. Another injection into the lumbar spine followed the MRI. In June of 2015, Mr. Hayes received a diagnostic facet joint injection due to ongoing complaints of pain in his lumbar spine. During a May of 2016, IME with Dr. Sassman, Mr. Hayes continued to note lower back pain, which worsened due to constipation. In 2017, Mr. Hayes undertook a course of physical therapy for lower back pain which began while he was shoveling snow. Mr. Hayes reported to the therapist that he suffered low back pain for 5 years, and especially since the electrocution injury. In March of 2017, Mr. Hayes visited Dr. Kawasaki with complaints of lower back pain for years that worsened over the previous 2 months. By March 15, 2018, the alleged date of injury in this matter, Mr. Hayes again began to notice pain in his lower back after hitting chunks of concrete on a daily basis.

(CE 2:31). The decision continued, in pertinent part:

> The claimant clearly had a preexisting lower back condition. Based upon the medical evidence and the opinions of Dr. Kennedy and Dr. Taylor, it appears that his work at Georgia Pacific, including driving over pothole-filled floors exacerbated or lit up his back pain causing the need for treatment and some extent of permanent disability.

(CE 2:32). The decision noted the following regarding industrial disability:

> Dr. Kennedy assessed Mr. Hayes with no permanent impairment based upon her treatment of Mr. Hayes. Further, she placed him at MMI on January 3, 2019. She placed permanent restrictions on him of working no more than 8 hours per day for 5 shifts or days per week. Dr. Taylor, the claimant's retained IME doctor, placed no such restrictions on Mr. Hayes, and simply relied on lifting restrictions, which were more stringent than those from Mr. Hayes' previous injury. Dr. Taylor assessed Mr. Hayes with a 7 percent body as a whole impairment. Considering that Mr. Hayes is currently working within the restrictions promulgated by Dr. Kennedy, I find Dr. Kennedy's restrictions to be more persuasive. I find Dr. Taylor's permanent impairment rating to be more persuasive. Mr. Hayes now makes $13.00 per hour with Hodge, compared to $17.25 per hour, plus some overtime, with Georgia Pacific. He has clearly suffered income loss based upon his disability. However, Mr. Hayes admits that he has no issues driving a forklift for his new employer. He admits to looking for new employment, but notes that he is only doing so because of his displeasure with his rate of pay. Considering all of the factors in an industrial disability analysis, as discussed above, I award Mr. Hayes a 10 percent industrial disability. This award entitles the claimant to 50 weeks of permanent partial disability benefits (10 percent x 500 weeks = 50 weeks), commencing on the stipulated date of January 3, 2019.

(CE 2:33).

The claimant appealed the arbitration decision to the Commissioner. On March 10, 2021, the Commissioner issued an appeal decision. (CE 3:36-39). In their appeal, the claimant argued that the underlying arbitration award was inadequate, and that the undersigned erred in calculating the claimant's weekly benefit rate. (CE 3:36). The Commissioner affirmed the restrictions promulgated by Dr. Kennedy, as noted above. (CE 3:37). The Commissioner concluded that restrictions offered by Dr. Taylor, along with those provided by Dr. Kennedy, "effectively precluded claimant from continuing his job with defendant-employer, which included overtime work and driving on a rough surface." (CE 3:37). Based upon the claimant suffering an actual loss of earnings, the Commissioner ruled that the claimant was entitled to an industrial disability award greater than the 10 percent awarded in the underlying arbitration decision. (CE 3:37). Considering the applicable industrial disability factors, the Commissioner found that the claimant sustained a 25 percent industrial disability. (CE 3:37). The Commissioner affirmed the rate calculation as provided in the underlying arbitration decision. (CE 3:38).

At the time of the previous arbitration hearing, the claimant worked at Hodge Company in Dubuque, Iowa. (Testimony). He started at Hodge in 2019. (Testimony). At Hodge, he drove a forklift and unloaded parts containers from John Deere for three hours per day. (Testimony). He also cleaned old bar codes off racks and containers. (Testimony). He earned thirteen and 00/100 dollars ($13.00) per hour. (Testimony).

He eventually received a raise to fifteen and 00/100 dollars ($15.00) per hour. (Testimony). He worked forty hours per week at Hodge. (Testimony). The floors at Hodge were "new," and smooth. (Testimony). He also drove a brand new forklift. (Testimony).

Mr. Hayes testified that he told Hodge about his previous work injuries. (Testimony). He testified that at the time of the initial arbitration hearing, he missed about 10 days of work in the previous several months due to issues with his back. (Testimony). Hodge had not given him any difficulty or negative feedback with this, at the time of the arbitration hearing. (Testimony). After the arbitration hearing, Mr. Hayes began to miss up to two days per week. (Testimony). He left employment with Hodge on April 19, 2021. (Testimony). He testified that working was "too hard" on his back. (Testimony). Since voluntarily resigning his employment with Hodge, Mr. Hayes has not looked for any employment. (Testimony).

Since the arbitration proceeding, Mr. Hayes has continued seeking medical care for his lower back condition. (Testimony). On August 26, 2020, Mr. Hayes met with Nurse Practitioner Angel Keller. (CE 4:40). He complained of low back pain and neck pain extending into his arms. (CE 4:40). He told Ms. Keller that his back pain was worsening. (CE 4:40).

Mr. Hayes continued seeing Dr. Schreiber, including on January 8, 2021. (CE 4:41). Mr. Hayes complained of low back pain, which was present for "many years." (CE 4:41). Mr. Hayes noted that pain was primarily located over the right lumbar region and into his legs. (CE 4:41). He began taking a Medrol dosepak, which provided some relief. (CE 4:41). Mr. Hayes had an MRI of his lumbar spine in January of 2021. (Testimony; CE 4:41). The MRI showed "multilevel degenerative changes of the lumbar spine without evidence of high-grade central canal or neuroforaminal narrowing." (CE 4:41). Mr. Hayes saw Dr. Schreiber again on January 26, 2021. (CE 4:41). During that visit, Mr. Hayes indicated that his pain was not work related, but clarified later that he was referring to his work at Hodge and not with the defendant-employer in this matter. (CE 4:41). Dr. Schreiber recommended that Mr. Hayes see Dr. Miller for pain management based upon the results of the MRI. (CE 4:41).

On February 8, 2021, Mr. Hayes presented to Dr. Miller's office for trigger point injections. (CE 4:41; Testimony). Upon discussion with Dr. Taylor during his IME in April of 2022, Mr. Hayes could not recall improvement from the injections. (CE 4:41).

Mr. Hayes presented to the emergency room in March of 2021, complaining of "a real bad sharp back pain." (CE 4:41; Testimony).

On March 24, 2021, Mr. Hayes returned to Dr. Schreiber's office with continued back pain related to his employment with Georgia Pacific. (CE 4:41). Dr. Schreiber recommended referral for another injection. (CE 4:41).

Mr. Hayes met with Dr. Matthew Howard at the University of Iowa on May 4, 2021. (CE 4:41). Mr. Hayes complained of neck and back pain, but told Dr. Howard

that his back pain was more problematic than his neck pain. (CE 4:41-42). Dr. Howard reviewed the MRI, and could not identify any neurosurgical issues, so he referred Mr. Hayes to the University of Iowa Pain Clinic. (CE 4:42; Testimony). Mr. Hayes indicated that his appointment with Dr. Howard only lasted about five minutes, as Dr. Howard previously reviewed the results of the MRI. (Testimony).

During a May of 2021, visit with Dr. Noeller at the University of Iowa, Mr. Hayes was seen dragging his right leg. (Testimony). He testified that since the arbitration hearing, dragging of his right leg worsened. (Testimony).

On June 23, 2021, Mr. Hayes began seeing Dr. Wikle. (Testimony; CE 4:42). Mr. Hayes rated his low back pain 7 out of 10 with dysesthesias and weakness extending into the right lower extremity. (CE 4:42). Dr. Wikle felt that Mr. Hayes' pain was multifactorial, and included myofascial pain, neuropathic pain, and sacroiliac pain. (CE 4:42). Dr. Wikle recommended continuing hydrocodone, an SI joint injection, a prescription of baclofen, and aqua therapy, physical therapy, and visits with a pain psychologist. (Testimony; CE 4:42). If the SI joint injection provided no relief, Dr. Wikle recommended a cluneal nerve block. (CE 4:42).

Dr. Miller provided a right SI joint injection on July 29, 2021. (CE 4:42). The injection provided no benefit to the claimant. (CE 4:42).

On November 11, 2021, Mr. Hayes met with Dr. Wikle for a right cluneal nerve block. (CE 4:42; Testimony). The nerve block provided temporary relief, as Mr. Hayes' pain levels dropped from 7 out of 10 to 4 out of 10; however, this relief did not last. (CE 4:42; Testimony).

In February of 2022, Mr. Hayes started aqua therapy, which helped for a short time, but eventually his pain would return. (Testimony; CE 4:42). In physical therapy, he performed a great deal of stretching. (Testimony). He felt he received no benefit from physical therapy. (Testimony).

On March 7, 2022, Mr. Hayes underwent a functional capacity evaluation ("FCE") at Short Physical Therapy, PLLC, in Callender, Iowa. (CE 1:1-17). At the outset of the examination, Mr. Hayes rated his pain 6 out of 10 in his lower back. (CE 1:2). As he proceeded through testing, his pain increased to 10 out of 10. (CE 1:2). The examiner found that Mr. Hayes provided a consistent effort on all tested areas. (CE 1:1). The examiner noted that Mr. Hayes "was very cooperative and his heart rate changes and body mechanics adjustments . . . were reflective of his effort." (CE 1:1).

Mr. Hayes had some limitations with the following areas: elevated work, sitting, standing work, walking, lifting from the floor to the waist up to 10 pounds, lifting from the waist to the crown up to 5 pounds, front carrying up to 10 pounds for up to 50 feet. (CE 1:2). Mr. Hayes had significant limitations including: forward bent standing, kneeling or half-kneeling, stairs, crawling, lifting from the floor to the waist up to 15 pounds, lifting from the waist to the crown up to 10 pounds, and front carrying up to 15 pounds up to 50 feet. (CE 1:2). Mr. Hayes could not crouch. (CE 1:2).

Measurements revealed severe deficits in range of motion in the trunk. (CE 1:7). He also had issues with range of motion in the bilateral shoulders. (CE 1:8). Mr. Hayes also had issues with range of motion in his bilateral hips. (CE 1:8). He had no issues with muscle strength in his knee or ankle. (CE 1:8-9).

Based upon the results of the examination, Mr. Hayes did not meet the capabilities of the sedentary category of physical demand. (CE 1:2). The examiner continued, "[i]f his condition would not improve to where he is able to demonstrate increased range of motion, strength and endurance of his low back he is essentially in an unemployable condition." (CE 1:2). The examiner recommended that Mr. Hayes limit standing and walking combined for up to 30 percent of the day due to decreased range of motion, strength and endurance in his low back. (CE 1:2). Mr. Hayes should also be allowed to sit, stand, and walk on an as needed basis. (CE 1:3). The examiner noted that Mr. Hayes' heart rate increased to "very high levels as his pain intensity increased." (CE 1:3). The level to which his heart rate increased placed Mr. Hayes at an unsafe level, beyond what is deemed safe for exercise purposes. (CE 1:3).

On April 6, 2022, Mr. Hayes reported to Medix where Dr. Taylor examined him again for an IME. (CE 4:40-47). Dr. Taylor is a certified independent medical examiner, is a fellow of the American College of Occupational and Environmental Medicine, and is board certified in occupational and environmental medicine. (CE 4:47). Mr. Hayes marked on a pain diagram that he had stabbing pain in the lower back and back of the right leg. (CE 4:49). He also had pins and needles pain in his right rear leg, behind his knee. (CE 4:49). On April 28, 2022, Dr. Taylor issued a report based upon his examination of the claimant. (CE 4:40-47). Dr. Taylor begins his report by reviewing Mr. Hayes' treatment history. (CE 4:40-43). Mr. Hayes continued to have physical therapy and followed up with Dr. Wikle. (CE 4:43). Mr. Hayes also took hydrocodone twice per day. (CE 4:43).

Mr. Hayes described persistent pain in the right lower back and/or lumbar region. (CE 4:43). This included "over and just above the iliac crest." (CE 4:43). Pain extended down the right thigh, with paresthesias and dysesthesias into the calf. (CE 4:43). His pain averaged between 6 and 7 out of 10. (CE 4:43). Mr. Hayes told Dr. Taylor that he had to get up, walk, stretch, and move around when his pain increases. (CE 4:43). He could not sleep for more than "a couple of hours at a time" before he had to get up and out of bed to move around. (CE 4:43). Mr. Hayes told Dr. Taylor that he could not tolerate his job at Hodge due to his back pain, even though Hodge "treated him well and were very accommodating." (CE 4:43).

One particular record was from an April 12, 2022, meeting with Beth Dinoff, Ph.D. (CE 4:42). Dr. Dinoff indicated in her records that Mr. Hayes was "not interested in working with pain psychology." (CE 4:42). Dr. Taylor spoke with Mr. Hayes about his visit with Dr. Dinoff. (CE 4:42). Mr. Hayes told Dr. Taylor that Dr. Dinoff indicated that the pain was "all in [his] head," and that Dr. Dinoff needed 8 to 10 sessions to "talk the pain away." (CE 4:42). Mr. Hayes described a rather awkward appointment with Dr. Dinoff, and indicated that he did not wish to continue seeing her. (CE 4:42-43).

Dr. Taylor observed that Mr. Hayes had an antalgic gait, and protected his right lower extremity. (CE 4:44). Mr. Hayes could take a few steps on his heels and toes with difficulty and the assistance of the exam table. (CE 4:44). He could only squat down one-third. (CE 4:44). Mr. Hayes had no tenderness to palpation over the left lower back or buttock, but had moderate to significant tenderness in his mid to lower right lumbar paraspinals. (CE 4:44). Dr. Taylor diagnosed Mr. Hayes with chronic right-sided lumbago with pain and paresthesias extending into the right buttock and leg, spondylosis, and moderate facet arthrosis. (CE 4:45).

Based upon his review of the medical records, his examination, and Mr. Hayes' increased average pain levels, Dr. Taylor opined that Mr. Hayes experienced an overall decline in his condition. (CE 4:45). Dr. Taylor continued, "there has been a substantial change in his work-related low back condition and for which he has undergone additional evaluation and treatment." (CE 4:45). Based upon his examination and the Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Taylor placed Mr. Hayes between the DRE Category II and DRE Category III due to Mr. Hayes not having been surgically treated. (CE 4:45-46). Dr. Taylor provided Mr. Hayes with a 9 percent whole person impairment rating. (CE 4:46).

Dr. Taylor recalled his previous restrictions, which included a 35-pound lifting limit to waist level, and a 30-pound limit between waist and chest level. (CE 4:46). Dr. Taylor proceeded to recommend certain restrictions, which were based upon the results of the FCE. (CE 4:46). Dr. Taylor noted that Mr. Hayes could generally tolerate lifting between five and 15 pounds on a rare to occasional basis. (CE 4:46). Mr. Hayes should also use a good lifting technique by keeping items close to his body, and moving his feet as opposed to twisting or turning his spine. (CE 4:46). Dr. Taylor recommended that Mr. Hayes have the ability to alternate sitting, standing, and walking, as needed for comfort. (CE 4:46). Dr. Taylor recommended that Mr. Hayes rarely bend forward. (CE 4:46). Mr. Hayes could occasionally sit, stand, and walk. (CE 4:46). He could only rarely kneel. (CE 4:46). He could occasionally travel, but needed to have the ability to stretch and move around as needed. (CE 4:46). Finally, Dr. Taylor recommended that the claimant infrequently climb stairs. (CE 4:46).

With regard to continuing medical care, Dr. Taylor recommended that Mr. Hayes follow-up with Dr. Wikle. (CE 4:46). He also recommended that Mr. Hayes meet with a pain psychologist. (CE 4:46). Dr. Taylor noted that Mr. Hayes had a negative interaction with Dr. Dinoff, and Dr. Taylor recommended that Mr. Hayes not see Dr. Dinoff again. (CE 4:46). Finally, Dr. Taylor recommended that Mr. Hayes continue with home exercises and stretches learned in therapy. (CE 4:47).

On April 29, 2022, Barbara Laughlin, M.A., of Laughlin Management, submitted an employability assessment report. (CE 5:52-73). Ms. Laughlin reviewed a number of documents, conferenced with Mr. Hayes, and produced an employability assessment based upon consideration of Mr. Hayes' "age, education, past work and transferable skills, site of injury, work restrictions, and ability to engage in employment for which he is fitted." (CE 5:52). Ms. Laughlin begins her report by reviewing Mr. Hayes' medical treatment. (CE 5:52-56). Ms. Laughlin noted that Mr. Hayes took hydrocodone, trazodone, metformin, Farxiga, and Tylenol as needed. (CE 5:57).

Ms. Laughlin opined, that based on Mr. Hayes' age of nearly 56 years old, he would be considered an "older worker." (CE 5:57). She cited to several studies indicating that older workers "often encounter resistance to hiring and promotion due to age." (CE 5:57). She then reviewed Mr. Hayes' educational history. (CE 5:59). Specifically, Mr. Hayes is a high school graduate who had average grades. (CE 5:59). He also took an electrical training course and had first responder training in 2007. (CE 5:59). Based upon her review, Mr. Hayes had few computer skills. (CE 5:59). He could do searches, but was unfamiliar with word processing or business programs. (CE 5:59). He was a "two-finger" typist. (CE 5:59).

Ms. Laughlin reviewed Mr. Hayes' employment history in light of the Dictionary of Occupational Titles, as published by the United States Department of Labor. (CE 5:59-61). Mr. Hayes' jobs at Eagle Window and Door varied between medium and heavy exertional levels. (CE 5:59). His job at J and J Pool, as a hot tub installer, and Hormel as a packager, was considered an unsuccessful work attempt. (CE 5:59-60). His employment with Quik Stop was light, but Mr. Hayes told Ms. Laughlin that he could not stand long enough in one spot. (CE 5:60). He worked in a medium level position at Casey's, but he received an accommodation. (CE 5:60). Mr. Hayes' job at Georgia Pacific was considered a medium exertional level. (CE 5:61). Finally, Mr. Hayes' position at Hodge was considered medium exertional level. (CE 5:61). Ms. Laughlin noted that Mr. Hayes left his position with Hodge because he "could not perform the work even with their willingness to accommodate his need to change positions." (CE 5:61). All of Mr. Hayes' positions were either semi-skilled or unskilled, except for two positions at Eagle Window and Door and one position at Casey's. (CE 5:59-61).

Mr. Hayes described the following perceptions of capabilities and limitations to Ms. Laughlin:

- Getting dressed is difficult.
- Putting on socks is difficult.
- Standing at the sink and doing dishes is difficult.
- He needs help with yard work.
- He can no longer mow with a self-propelled mower.
- He cannot shovel snow.
- He cannot shoot pool.
- He cannot fish.
- He cannot camp.
- He cannot get into the upper-level cabinets.
- His sleep is interrupted by pain nightly. He is up almost every hour throughout the night. He only sleeps about 3-4 hours a night. He lays down during the day 5-6 times for about ½ an hour and naps. Laying down helps alleviate his pain more than sitting and standing. He feels exhausted.
- Getting groceries is difficult for him-he can unload them at his house but needs to make multiple trips. He has difficulty picking up mild [*sic*] or a case of water at the grocery store and putting it in the cart. He

has had to ask for assistance to obtain his groceries as well as putting them into his vehicle.
- His sleep is interrupted by pain and now he is able to sleep only a few hours at a time.
- He rates his pain as 7-8 on a rising 1-10 scale, and states it is constant. The pain is a 10 on a bad day. He has trouble with pain going down his right leg, now with paresthesias into the calf. He has been referred to the Pain Clinic at UIHC.
- He has difficulty with lifting, carrying, pushing and pulling-this has gotten worse.
- He only drives locally.
- He feels his balance is impaired.
- He can only comfortably sit for 30 minutes.
- He states he is uncomfortable after standing more than 10 minutes.
- He is only comfortable walking for 10 minutes.
- It is difficult to put on his seatbelt.
- He gets cramping in his hands.
- Recently, he had an FCE with DPT Short. He was not able to squat.
- He has to take breaks when he travels. From Dubuque to Iowa City, he has to stop 3-4 times so he can get out and walk around.
- He used to play pool in a league and can no longer do this.
- He used to fish and can no longer do this.
- He used to walk 2-3 miles a day and can no longer do this. He can only walk about a block.

(CE 5:61-62). While Ms. Laughlin noted that she did not include these perceptions in her assessment of loss, it is important to consider the claimant's perceptions in light of his testimony, and a potential industrial disability analysis. (CE 5:62).

Ms. Laughlin continued with a vocational analysis. (CE 5:62-67). She used an OASYS transferable skills analysis program, which only addresses occupational loss due to a decrease in functional capacity, or medically imposed restrictions. (CE 5:62). She noted that it did not address things like age, education, training, injury, pain, or other factors. (CE 5:62). Using Dr. Taylor's restrictions, Mr. Hayes had a 98.6 percent occupational loss after injury in occupations that closest match his skills. (CE 5:64). He had a 93.4 percent occupational loss in occupations that were a "good" match for his skills. (CE 5:65). Finally, Mr. Hayes had a 95.4 percent occupational loss in unskilled occupations. (CE 5:65). Ms. Laughlin opined that Mr. Hayes' need to change position as needed is a "severe restriction" as noted by Social Security Disability. (CE 5:65). Ms. Laughlin then used the restrictions of Dr. Taylor and found the following jobs available to Mr. Hayes within his restrictions: election clerk, grinding machine operator, appointment clerk, maintenance service dispatcher, and check cashier. (CE 5:66). Of note, Ms. Laughlin did not find any openings for these positions in the area. (CE 5:66).

Using the restrictions of the FCE, Ms. Laughlin opined that the claimant had a 100 percent occupational loss for the "closest match" occupations. (CE 5:65). This means that he had a 100 percent occupational loss for all semi-skilled and skilled

occupations after his injury. (CE 5:65). He had a 95 percent occupational loss for "good match" occupations, and a 98.2 percent occupational loss for unskilled occupations. (CE 5:65). Ms. Laughlin then performed a labor market survey, which showed the following occupations available to Mr. Hayes based upon the restrictions of the FCE: maintenance service dispatcher, appointment clerk, microfilming document preparer, and election clerk. (CE 5:66-67).

Ms. Laughlin continued by noting the following factor, which impeded Mr. Hayes' ability to return to work:

- Current medically imposed limitations. Those limitations are expressed through occupational loss per the OASYS transferable skills assessment.
- Mr. Hayes is now considered an older worker, a trait making him less attractive to many employers.
- Mr. Hayes lacks computer skills often needed in sedentary and light exertional level occupations.
- He is currently unable to perform sedentary work without accommodations according to the most recent FCE and it [*sic*] in the less than sedentary category.
- The FCE states he lacks the ability to sit, stand or walk for prolonged periods of time. All activities are considered occasional; he could not perform sedentary work, requiring frequent sitting. The FCE states his standing/walking combined is occasional.
- Mr. Hayes has shown the ability to obtain work. His difficulty is maintaining employment in the environment of significant pain and his need to change position.

(CE 5:67). Ms. Laughlin continued, "[t]he transferable skills analysis demonstrates Mr. Hayes' worsening condition. He has very few jobs available to him following the transferable skills analysis using the limitations of Dr. Taylor." (CE 5:67). Further, Ms. Laughlin noted, that the limitations provided by Dr. Taylor and the FCE, presented a situation that would require accommodations considered unreasonable by most employers. (CE 5:67). Ms. Laughlin continued, "[i]t is my opinion that at this time, without a decrease in his symptoms/restrictions or an increase in his skills, Mr. Hayes will find no further work in any quality, quantity or dependability that he can perform." (CE 5:68). His difficulty moving forward, according to Ms. Laughlin would be in maintaining employment, not finding employment. (CE 5:68).

Mr. Hayes testified that he continued to experience pain in his right lower back in the belt area. (Testimony). The pain never goes away. (Testimony). He rated his pain 6 out of 10 on his best day and 10 out of 10 on his worst day, with an average of 7 to 8 out of 10. (Testimony). Things like walking too far, sitting for too long, and standing for too long aggravate his back pain. (Testimony). In order to alleviate his back pain, he testified that he needed to lay down upwards of six times per day. (Testimony). He took hydrocodone to relieve his pain, which he had taken since 2010. (Testimony). His pain radiated down his right leg. (Testimony). He also testified that his right leg

periodically gives out when walking. (Testimony). Dr. Miller suggested to him that he get a cane for support. (Testimony).

Mr. Hayes testified that he had problems squatting, bending over, and lifting. (Testimony). He could not comfortably put on his shoes and socks, nor could he pick up something from the floor without pain. (Testimony). He could no longer bend over, stoop, kneel or crawl on the ground. (Testimony). He could no longer fully squat and could not extend or rotate his lower back. (Testimony). Mr. Hayes could lift some groceries to carry them into his home, but noted that lifting the laundry basket was "tough." (Testimony). He could walk up to one block before his low back and right leg began to hurt. (Testimony).

Mr. Hayes described worsening problems with sleeping. (Testimony). He testified that he sleeps for maybe one hour, and then pain causes him to awaken. (Testimony). He woke up about six times per night. (Testimony). He also noted that his mental health has worsened. (Testimony). Specifically, he testified that he had depression and suicidal thoughts. (Testimony).

Since the arbitration hearing, he no longer mows his lawn, and has his brother assist him with that task. (Testimony). He also no longer shovels his own snow, and has a neighbor help him. (Testimony).

Mr. Hayes applied for Social Security Disability benefits, in October of 2021, but was initially denied eligibility. (Testimony). He has an appeal on file, which is not yet scheduled to be heard. (Testimony).

The claimant opined that he could no longer work in any of the previous positions which he held due to the physical requirements of those positions. (Testimony).

Mr. Hayes agreed that aqua therapy benefitted him, and he wishes to continue aqua therapy. (Testimony). He also wishes to have a consultation with a neurosurgeon in order to determine whether there is a surgical option for his lower back and right leg pain. (Testimony). Specifically, the claimant requests a visit with Dr. Jonathan Citow in Libertyville, Illinois, or "with some other qualified neurosurgeon qualified to give him a second opinion to that of Dr. Howard…." (Claimant's Posthearing Brief, p. 13).

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. 6.904(3).

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code section 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal. Co., 228 Iowa 1031, 1038, 291

N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury*." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999)(emphasis in original).

Before considering any other disputed issue in this case, I must first determine whether Mr. Hayes has established a change in condition following the previous arbitration and appeal decision. Mr. Hayes presents his own testimony, medical evidence, a valid FCE, and a repeat IME conducted by Dr. Taylor. When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

At the initial arbitration hearing, Mr. Hayes testified that he had lower back pain in the right side of his back that ranged between 3 and 10 out of 10. He also had tingling and sharp pain in his legs. He further testified that bending, lifting and sometimes walking, caused his low back pain to flare. He could not sit for more than 30 minutes before his back would stiffen. He could still maintain his lawn, but testified as to difficulty with shoveling snow due to his lower back pain. Mr. Hayes testified that he believed he would have difficulty performing a number of his previous jobs, which were physically demanding in nature.

In their posthearing brief, the defendants concede that, based upon the unrebutted report of Dr. Taylor, Mr. Hayes "is likely able to prove that his March 15, 2018, lower back injury is a proximate cause of his current condition." (Defendants' Posthearing Brief, p. 6). The defendants attempt to pin some of Mr. Hayes' increased pain and restrictions on his previous injury with Eagle Window and Door. There is little evidence in the record as to that injury, and as to the restrictions that he received from that injury. While he complained of pain from that incident, his injuries, and the associated impairment were due to neck and arm issues. The injuries in this case involve the lower back with radiation of pain into the lower extremity. Therefore, the defendants' argument rings hollow.

Mr. Hayes testified to worsening pain at the review-reopening proceeding. He indicated that his pain averaged between 7 and 8 out of 10. He indicated that his back pain required him to lay down upwards of six times per day. He also indicated that his leg gives out on him when he walks. He testified to problems with squatting, bending

over and lifting. He could no longer put on shoes or socks without significant pain. He testified to worsening sleep issues. He also no longer mows his lawn or shovels his own snow, which he did at the time of the arbitration hearing. The FCE provided increased restrictions as to Mr. Hayes' capabilities. Dr. Taylor also increased restrictions on the claimant. Finally, Dr. Taylor indicated that Mr. Hayes had an increased functional impairment.

Based upon the information in the record, the claimant has proven, by a preponderance of the evidence, that he suffered an impairment and/or lessening of earning capacity proximately caused by the original injury.

Healing Period Benefits

The claimant argues that he is entitled to temporary disability benefits for a running healing period. The claimant alleges that this running healing period should begin on April 20, 2021, which is the day after he voluntarily left his employment with Hodge. The claimant alleges that working at Hodge was too difficult based upon his pain in his back and right leg. The claimant argues in his posthearing brief that, '[h]ealing period benefits should be provided while there is a reasonable hope or expectation of improvement in Dale's condition." (Claimant's Posthearing Brief, p. 13). The claimant bases their argument in their request for alternate care pursuant to Iowa Code section 85.27, for a second opinion with Dr. Jonathan Citow in Libertyville, Illinois. The request for alternate care will be addressed separately.

The defendants argue that the claimant's voluntary resignation from employment with Hodge was tantamount to a refusal of suitable work. If the claimant refused suitable work, he would no longer be entitled to receiving healing period benefits.

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

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury.

Iowa Code 85.33(1) provides

> . . . the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Temporary total disability benefits cease when the employee returns to work, or is medically capable of returning to substantially similar employment.

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus. Inc., 881 N.W.2d 360 (Iowa 2016); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

An employer's acceptance of an employee's voluntary quit from suitable employment is a rejection of suitable work on that date and any future date. Schutjer, 780 N.W.2d at 559. The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489 (App. February 25, 2005).

Healing period may be characterized as a period during which there is a reasonable expectation of improvement of a disabling condition. Pitzer v. Rowley Interstate, 507 N.W.2d 389, 391 (Iowa 1993)(citation omitted). The Iowa Supreme Court has held that persistence of pain "may not itself prevent a finding that the healing period is over, provided the underlying condition is stable." Myers v. F.C.A. Services, Inc., 592 N.W.2d 354, 359 (Iowa 1999)(citing Pitzer v. Rowley Interstate, 507 N.W.2d 389, 391 (Iowa 1993)). Iowa courts have previously held that medical evidence of anticipated improvement may extend a healing period, even if it is later demonstrated that an injury stabilized earlier than anticipated. Id. (citing Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 125 (Iowa App. 1984)). The Iowa Court of Appeal has held:

> Section 85.34(1) leaves room for the possibility that continuing medical treatment provided by the employer under section 85.27 can result in a series of intermittent invasive treatments, periods of temporary disability from work and convalescence, serial MMI dates, and revised permanent disability ratings following a single work-related injury.

Annett Holdings, Inc. v. Roberts, 964 N.W.2d 14, 3 (Iowa App. 2021)(citing Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (Iowa 2012)).

I do not find the defendants' argument that the claimant's voluntary resignation from his employment with Hodge was a refusal of suitable work that would disqualify him from receiving temporary disability benefits to be convincing. Iowa Code section 85.33(3) is clear that the discontinuance of benefits to a worker who refuses to accept suitable work offered by the employer applies to temporary partial disability benefits. Healing period benefits and temporary total disability benefits are located under a

different portion of the statutes. Applying the analysis urged by the defendants would not be consistent with the plain language of the statute.

In the underlying arbitration proceeding, the parties agreed that the claimant achieved maximum medical improvement ("MMI") on January 3, 2019. Since that time, the claimant has had additional pain, and a general degradation of his physical capabilities. However, his underlying condition appears to be stable based upon the information in the record. Mr. Hayes had an MRI which showed degenerative issues. Mr. Hayes has had a number of injections and attempts at therapy since the arbitration proceeding. Similar to the attempts prior to the arbitration hearing, these treatments offered no long-term improvement to his pain. Additionally, a neurosurgeon opined that there were no neurosurgical options to treat his complaints of pain. Based upon this, the claimant has not proven a reasonable expectation of improvement in his disabling condition. There is no information in the record indicating that the claimant entered a new period of disability based upon his voluntary resignation from Hodge. If anything, the claimant testified that Hodge was willing to accommodate his pain issues and allowed him to take time off as needed. Based upon the medical evidence, it appears that the claimant's underlying condition was stable, despite his subjective complaints of pain. I conclude that there is not a new healing period. Therefore, the claimant is not entitled to a running award of healing period benefits.

Permanent Disability

The claimant argues that he is permanently and totally disabled as a result of the work injury. The defendants argue that the claimant is only entitled to a small increase in his industrial disability award based upon his continued complaints and the increase in permanent impairment rating from Dr. Taylor.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004)(discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories,

rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish that they are totally and permanently disabled if the claimant's medical impairment, taken together with nonmedical factors totals 100-percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100-percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003)(quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633. However, finding that the claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen, Co., the Iowa Supreme Court formally adopted the "odd-lot doctrine." 373 N.W.2d 101 (Iowa 1985). Under that doctrine, a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to provide evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, then the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include: the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

The claimant is 56 years old. Ms. Laughlin concluded that this made him an older worker, and thus he would likely encounter resistance in hiring. Mr. Hayes was

an average student who earned a high school diploma. He has few computer skills and is a "two-finger" typist. His employment history includes working in meatpacking for a short time. He then worked at Eagle Window and Door for 27 years. He worked in maintenance, and eventually took some classes in electrical work. After leaving Eagle Window and Door, he made an attempt to work at a hot tub installation company, Kwik Stop, Casey's General Store, and Blaine's Farm & Fleet. He eventually started working at Georgia Pacific, where he drove a forklift all the time. After leaving Georgia Pacific, he worked for Hodge. At Hodge, he operated a forklift for part of the day, and then took stickers off John Deere parts racks. It does not appear that the claimant would be a good candidate for retraining based upon his employment history.

Ms. Laughlin, a vocational expert, completed an employability assessment report. She considered Mr. Hayes' work at Eagle Window and Door to have been between medium and heavy duty. Some of his jobs after Eagle Window and Door were considered unsuccessful work attempts. His work at Casey's and Georgia Pacific was considered a medium exertional level. All of his positions were either semi-skilled or unskilled, but for two of his positions at Eagle Window and Door and one position at Casey's.

Ms. Laughlin considered the restrictions provided by the FCE and affirmed by Dr. Taylor in her employability analysis. The FCE revealed "some" limitations with the following areas: elevated work, sitting, standing work, walking, lifting from the floor to the waist up to 10 pounds, lifting from the waist to the crown up to 5 pounds, front carrying up to 10 pounds for up to 50 feet. Mr. Hayes had "significant" limitations involving: forward bent standing, kneeling or half-kneeling, stairs, crawling, lifting from the floor to the waist up to 15 pounds, lifting from the waist to the crown up to 10 pounds, and front carrying up to 15 pounds up to 50 feet. Mr. Hayes could also not crouch. Of note, the FCE examiner found that Mr. Hayes' heart rate increased to a level that is unsafe for even exercise purposes when he was lifting. Based upon the results of the FCE, the examiner opined that the claimant did not even meet the capabilities of a sedentary category of physical demand. He also was "essentially in an unemployable position," unless he could improve his condition.

Dr. Taylor noted that Mr. Hayes had an antalgic gait that protected his right lower extremity. He also had issues with squatting during an IME. Dr. Taylor recalled his previous restrictions, which included a 35-pound lifting limit to waist level, and a 30-pound limit between waist and chest level. Dr. Taylor proceeded to recommend certain restrictions, based upon the results of the FCE. Specifically, Dr. Taylor noted that Mr. Hayes could generally tolerate lifting between five and 15 pounds on a rare to occasional basis. Mr. Hayes would need to use a good lifting technique by keeping items close to his body, and moving his feet as opposed to twisting or turning his spine. Dr. Taylor continued by recommending that Mr. Hayes have the ability to alternate sitting, standing, and walking, as needed for comfort. Dr. Taylor recommended that Mr. Hayes rarely bend forward. Mr. Hayes could occasionally sit, stand, and walk, but could only rarely kneel. The claimant could occasionally travel, but needed to have the ability to stretch and move around as needed. Finally, Dr. Taylor recommended that the claimant infrequently climb stairs.

Based upon the restrictions provided by Dr. Taylor, Ms. Laughlin opined that Mr. Hayes had a 95.4 percent occupational loss in unskilled occupations, and a 93.4 percent occupational loss in occupations that were a good match for his skills. Based upon the restrictions provided by the FCE, Ms. Laughlin opined that the claimant has a 100 percent occupational loss for occupations that were the "closest match" to his employment history and skill set. This included semi-skilled and skilled occupations. She opined that he had a 95 percent occupational loss for "good match" occupations, and a 98.2 percent loss for unskilled occupations.

Ms. Laughlin opined that Mr. Hayes' need to change positions as needed was a "severe restriction." She continued by noting that Mr. Hayes' inability to perform even sedentary work according to the FCE results was a limiting factor on the positions available to him. Ms. Laughlin also noted that Mr. Hayes is able to obtain work; however, he has difficulty maintaining employment based upon his significant pain and need to change positions. According to Ms. Laughlin's report, Mr. Hayes has restrictions from both Dr. Taylor and the FCE that most employers would be unable to reasonably accommodate. Ms. Laughlin concluded her report by saying "[i]t is my opinion that at this time, without a decrease in his symptoms/restrictions or an increase in his skills, Mr. Hayes will find no further work in any quality, quantity or dependability that he can perform."

The restrictions provided in Dr. Taylor's IME, the FCE, and the results of Ms. Laughlin's reports are afforded substantial weight, even though Dr. Taylor's assessment of permanent impairment for the claimant was 9 percent to the whole person.

The Commissioner previously found that the claimant suffered a 25 percent industrial disability. Considering the claimant has not shown entitlement to an additional healing period, I now consider whether the claimant is entitled to additional industrial disability benefits, or whether the claimant is permanently and totally disabled. As the court notes in Guyton, only in an exceptional case would evidence be sufficiently strong to compel a finding of total disability as a matter of law. Id. As discussed above, this is a case where the evidence is sufficiently strong pointing to the conclusion that the claimant has provided substantial evidence that he is no longer employable in the competitive labor market. Furthermore, the claimant has shown that the only services that he can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. I further conclude that the employer has not shown that suitable employment is available to the claimant. While the claimant did maintain employment at Hodge for a time, his restrictions from the FCE and Dr. Taylor's IME, when taken in conjunction with the results of Ms. Laughlin's report, make it clear that the claimant's condition has continued to degrade. Mr. Hayes also testified that he increasingly took time off from Hodge before his voluntary resignation due to increasing pain. While the claimant had a prior injury at Eagle Window and Door, his permanent disability is based upon his injuries from his time at Georgia Pacific. Specifically, the claimant's injuries were to his lower back with pain radiating into his leg. Considering the evidence in the record, the claimant is permanently and totally disabled based upon the odd-lot doctrine.

Penalty

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty present of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to provide a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

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

reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112.

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa 1999).

The claimant argues for an award of a penalty based upon an unreasonable delay in medical care recommended by Dr. Wikle. This case included physical therapy, aquatic therapy, and referral to a pain psychologist. The claimant also blames the defendants for a delay in his application for social security disability benefits. The claimant alleges that the defendants refuse to pay any additional healing period or permanency benefits to the claimant. They request a 50 percent penalty for "past due weekly benefits."

The defendants argue that the claimant is not entitled to additional healing period benefits, and therefore would not be entitled to a penalty. They further argue that the claimant is not entitled to a penalty because the claim for additional healing period benefits is fairly debatable.

I previously determined that the claimant is not entitled to an additional healing period. Even if the claimant were entitled to an additional healing period, the entitlement to healing period benefits based upon the claimant's voluntary resignation from Hodge created a good faith issue of law or fact that made the defendants' liability for the benefits fairly debatable. Based upon the foregoing, and the evidence in the record, there is not an appropriate basis for an award of penalty benefits.

85.27 Alternate Care

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

> For purposes of this section, the employer is obligated 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.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). 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).

The employer must furnish "reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g.

Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The claimant requests alternate medical care in the form of a second opinion by a neurosurgeon, specifically, Dr. Jonathan Citow, of Libertyville, Illinois, or another qualified neurosurgeon. The claimant alleges that he is entitled to alternate medical care because the care provided by Drs. Howard and Wikle did not provide "meaningful improvement" to the claimant's condition. (Claimant's Posthearing Brief, p. 12).

The defendants provided for treatment with Dr. Wikle and a consultation with Dr. Howard at the University of Iowa. Dr. Howard appears to be a qualified neurosurgeon. He did not make any recommendations for further consultation. He indicated that the claimant was not a surgical candidate.

Based upon the information in the record, I find that the claimant has not proven that the care offered is unreasonable. No authorized treating doctor has recommended a second opinion. It appears that the claimant's request for care with Dr. Citow is simply due to dissatisfaction with care. Therefore, the request for alternate medical care is denied.

Reimbursement for IME Pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.
>
> . . .
>
> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which

> the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. The claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). The claimant need not prove that the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

The claimant requests reimbursement for the expenses associated with Dr. Taylor's IME. The claimant argues that the defendants' referral of the claimant to Dr. Howard for evaluation and treatment, and his subsequent conclusion that there was not a surgical solution to the claimant's issues, is akin to an opinion of no change in a permanent impairment. This argument, while creative, is neither convincing, nor correct.

There is no evaluation of permanent disability provided by anyone but Dr. Taylor. Dr. Taylor was retained by the claimant to provide opinions. Dr. Howard provided an opinion as to potential future treatment options for the claimant. He made no mention of permanent impairment, or even causation, as the doctor did in Kern. The claimant has not proven an entitlement to reimbursement of Dr. Taylor's IME fees based upon Iowa Code section 85.39.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 6. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed

> the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

> The claimant requests reimbursement of costs as follows:
>
> Filing fee – one hundred and 00/100 dollars ($100.00)
>
> Short Physical Therapy FCE – nine hundred fifty and 00/100 dollars ($950.00)
>
> Taylor IME – one thousand eight hundred thirty-seven and 50/100 dollars ($1,837.50)
>
> Laughlin Vocational Report – one thousand one hundred fifty and 00/100 dollars ($1,150.00)

(CE 6). The defendants (correctly) argue that the claimant is only allowed reimbursement for the filing fee and two of the reports. The costs of the filing fee are one hundred three and 00/100 dollars ($103.00), as they include a convenience fee. (CE 6:75). The cost for the FCE report was three hundred fifty and 00/100 dollars ($350.00). There is no indication which portion of Dr. Taylor's invoice in Claimant's Exhibit 6:77 relates to the report. There is a portion which is entitled "abstract medical records," but I do not find this clear enough to consider it the drafting of the IME report. Finally, the report from Ms. Laughlin cost five hundred sixty-two and 50/100 dollars ($125.00 x 4.5 = $562.50).

Based upon my discretion, I award the claimant one hundred three and 00/100 dollars ($103.00) for the filing fee and associated convenience fee. I also award the claimant the cost of the FCE report of three hundred fifty and 00/100 dollars ($350.00), and the cost of Ms. Laughlin's report of five hundred sixty-two and 50/100 dollars ($562.50). The total costs awarded are one thousand fifteen and 50/100 dollars ($1,015.50).

ORDER

THEREFORE, IT IS ORDERED:

Claimant has proven an entitlement to review-reopening benefits pursuant to Iowa Code section 86.14.

Claimant is not entitled to a "running award" of healing period benefits.

All weekly benefits shall be paid at the stipulated rate of four hundred eighty-four and 98/100 dollars ($484.98) per week.

Defendants shall pay claimant permanent total disability benefits on a weekly basis from October 1, 2021, through the date of the review-reopening hearing, and continuing into the future during the period of claimant's total disability.

Defendants shall be entitled to credits for weekly benefits paid to date.

Claimant's request for alternate care is denied.

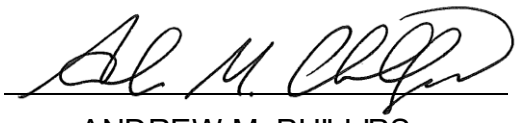
Claimant is not owed penalty benefits.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall reimburse the claimant one thousand fifteen and 50/100 dollars ($1,015.50) for costs.

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

Signed and filed this 15th day of July, 2022.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Christopher Fry (via WCES)

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