BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY R. DANILSON, Claimant, vs. COLLEGE COMMUNITY SCHOOL DISTRICT, Employer, WEST BEND MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5067985.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1801, 2204 2501, 2502, 2701, 2907

STATEMENT OF THE CASE

Kelly Danilson, claimant, filed a petition for arbitration against College Community School District, as the employer, and West Bend Mutual Insurance Company, as the insurance carrier. This case came before the undersigned for an arbitration hearing on August 4, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants, including the court reporter, appeared remotely via the CourtCall video platform.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 7, as well as Defendants Exhibits A through I. As the result of an evidentiary ruling at the time of hearing, the record was suspended at the conclusion of the arbitration hearing pending receipt of Defendants' Exhibit I, which was timely filed and is received into the evidentiary record.

Claimant testified on his own behalf. No other witnesses testified live at the hearing. The testimonial record closed at the conclusion of the arbitration hearing and the evidentiary record closed completely once defense Exhibit I was filed.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on September 20, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to a running healing period from November 9, 2018 through the date of the arbitration hearing.

2. Whether the work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability benefits.

3. The proper commencement date for permanent disability benefits.

4. Whether claimant is entitled to reimbursement of her independent medical evaluation fees pursuant to Iowa Code section 85.39.

5. Whether claimant is entitled to alternate medical care into the future.

6. Whether claimant is entitled to vocational rehabilitation benefits pursuant to Iowa Code section 85.70.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Kelly Danilson, claimant, is a 45-year-old gentleman, who possesses a bachelor's degree in education from Iowa State University and a Master's in education degree from Graceland University. Mr. Danilson began his teaching career as a physical education teacher in Missouri. However, he accepted employment at College Community School District in 2003. College Community School District is located in Cedar Rapids, Iowa and is locally known and referred to as "Cedar Rapids Prairie" (hereinafter referred to as "Prairie").

During his stint with Prairie, Mr. Danilson worked as an elementary and high school physical education teacher. While working as a teacher, claimant also engaged in coaching duties. In 2017, claimant accepted a new position with Prairie and began transitioning to a full-time position as a Building Facilitator. As a Building Facilitator, Mr. Danilson was an aide to the school administration performing classroom management support. In essence, claimant worked with disruptive and struggling students dealing with school and non-school related issues.

Mr. Danilson sustained an admitted mental injury as a result of an unfortunate event occurring at the school on October 25, 2018. On that date, a student was having a mental health crisis and left the school building. That student began running toward Interstate 380, which is located just off school premises, and appeared intent upon committing suicide.

Mr. Danilson received notification of the student's flight, left the school building, and observed what was transpiring. He immediately began running toward the fleeing student, climbed the fence and positioned himself between the student and the interstate traffic. Ultimately, claimant was able to verbally de-escalate the situation and get the student to return to a safe-room within the school. Once in the safe-room, the student began some self-harm, and claimant restrained the student until the student's mother arrived.

As a result of the events of October 25, 2018, claimant sustained some mental health injuries. The precise diagnosis and extent of those injuries is disputed, however. Mr. Danilson testified that he has ongoing effects from this event, including difficulties with his memory, inability to organize his thoughts, inability to maintain concentration and focus, fatigue or lack of stamina, among various other symptoms. Claimant testified that he has good days and bad days but does not believe he can return to work at this time because he cannot consistently string good days together to perform employment activities. Therefore, claimant contends that the effects of this event continue to affect him daily and that he is entitled to a running healing period. Defendants contend claimant has achieved maximum medical improvement and is entitled to little, if any, permanent disability.

Claimant first sought medical care after the incident with his personal physician, Jason Booth, M.D., on October 31, 2018. At that initial evaluation, claimant reported racing thoughts, being on edge, not sleeping well, and being short-tempered. Dr. Booth noted that claimant reported the onset of his symptoms "was approximately a few week(s) ago" and were "gradually worsening since that time." (Joint Exhibit 1, page 1) Dr. Booth recommended psychiatric evaluation after recognizing the possibility of post-traumatic stress disorder (PTSD) arising from the incident. (Joint Ex. 1, p. 3) Claimant denies pre-existing symptoms, though it is strange that his initial medical encounter suggests his symptoms predated the October 25, 2018 incident.

At any rate, Prairie accepted the claim and redirected claimant for medical care through an occupational medicine physician, Shirley J. Pospisil, M.D. Dr. Pospisil evaluated claimant on November 5, 2018. She also recognized the possibility of PTSD and removed claimant from work. (Joint Ex. 2, pp. 6-7) Claimant returned to Dr. Pospisil two days later. In her November 7, 2018 office note, Dr. Pospisil documents symptoms of PTSD and referred claimant to a mental health counselor, Cher Stephenson, LMHC, CRC. (Joint Ex. 2, p. 8)

Ms. Stephenson initially met with claimant on November 13, 2018. She initially diagnosed claimant with acute stress disorder, which eventually resulted in a diagnosis of PTSD after the passage of time. (Joint Ex. 3, p. 54) Ms. Stephenson has continued

to provide mental health counseling to claimant from November 13, 2018 through the date of the arbitration hearing.

The initial factual dispute that must be resolved in this case is claimant's mental health diagnosis. As noted above, claimant's personal physician, Dr. Booth, has referred to a PTSD diagnosis. The authorized occupational medicine physician, Dr. Pospisil, has offered a PTSD diagnosis. The authorized therapist, Ms. Stephenson, has provided a PTSD diagnosis.

In addition to these three medical providers, defendants obtained a neuropsychological evaluation and opinion from Daniel Tranel, Ph.D. Dr. Tranel evaluated claimant on November 6, 2019. Following administration of neuropsychological testing and evaluation, Dr. Tranel opined that claimant sustained PTSD and major depressive disorder, moderate with anxious distress. Dr. Tranel causally related his diagnoses to claimant's experiences at Prairie on October 25, 2018. (Defendants' Ex. B, p. 9)

Defendants also obtained an independent medical evaluation performed by a board certified psychiatrist, Martin Carpenter, M.D. on June 2, 2021. Dr. Carpenter concurred with Dr. Tranel and diagnosed claimant with PTSD. However, Dr. Carpenter opined that the PTSD could not be directly attributable to the one incident at Prairie on October 25, 2018. (Defendants' Ex. C, p. 9)

Defendants also solicited and obtained a records review by another psychologist, John Brooke, Ph.D. Dr. Brooke questioned the PTSD diagnosis. Instead, Dr. Brooke opined that claimant sustained an adjustment disorder and opined that this diagnosis was a reaction to various job difficulties not just the alleged injury on October 25, 2018. (Defendants Ex. D, p. 7)

Mr. Danilson also obtained an independent psychological evaluation, performed by Frank S. Gersh, Ph.D. on February 21, 2021. Dr. Gersh concurred with the majority of the other medical providers and offered PTSD as his diagnosis. Dr. Gersh also concurred that claimant suffers from major depressive disorder and causally related both diagnoses to the work incident on October 25, 2018. (Claimant's Ex. 1, p. 4)

Considering these various diagnoses, I note that all medical providers and evaluators concur with the PTSD diagnosis except Dr. Brooke. Dr. Brooke is a psychologist with good credentials. However, he did not evaluate claimant and performed only a record review in this case. His opinion appears to be the "outlier" among these medical professionals. Dr. Tranel, Dr. Carpenter, and Dr. Gersh are all equally, if not more, qualified to offer a diagnosis for claimant's condition. Each of these medical providers concurs with the treating therapist that the proper diagnosis is PTSD. I accept the opinions of therapist Stephenson, Dr. Tranel, Dr. Carpenter, Dr. Pospisil, and Dr. Gersh that claimant suffers from PTSD. I find that claimant's PTSD is the result of the events of October 25, 2018, or that the events of October 25, 2018 have materially aggravated and worsened any underlying, though undiagnosed, mental health condition. I further accept the diagnoses of Dr. Tranel and Dr. Gersh that

claimant suffers from major depressive disorder as a result of the October 25, 2018 events.

Having determined the diagnoses for claimant's injury and its causal connection to the October 25, 2018 events, the next factual issue to determine is whether claimant has achieved maximum medical improvement (MMI) or remains in a healing period as of the date of hearing. Again, there are contradictory opinions on this issue.

Dr. Pospisil has opined that claimant reached MMI on October 10, 2020. Dr. Pospisil opined that claimant might need retraining to a different profession. (Joint Ex. 2, p. 45) However, she subsequently indicated that claimant does not require permanent restrictions other than staying away from the Prairie school campus. (Joint Ex. 2, p. 50) Ultimately, however, Dr. Pospisil indicated that she would defer to the opinions of a psychiatrist or psychologist. (Joint Ex. 2, p. 50)

Therapist Stephenson issued what appears to be contradictory or conflicting opinions in this case. In January 2021, Ms. Stephenson opined that claimant was not yet at MMI and required ongoing therapy. (Joint Ex. 3, pp. 227-228) In a June 14, 2021 report, Ms. Stephenson opined that claimant was at or near MMI. However, she opined that claimant would require additional therapy. She suggested that the ongoing therapy would be "to manage or improve symptoms." (Joint Ex. 3, p. 231) The expectation of improvement of symptoms suggests that claimant has not achieved MMI.

Claimant also produces and relies upon the opinions of Dr. Gersh. Dr. Gersh opines that claimant has not achieved MMI and notes that claimant continues to make progress in his therapy. (Claimant's Ex. 1, pp. 4-5) Dr. Gersh evaluated claimant three times and provided a supplemental report after his third interview on July 7, 2021. Once again, Dr. Gersh opined that claimant still had not achieved MMI. (Claimant's Ex. 1, p. 12)

Perhaps more importantly, Dr. Gersh did not simply recommended "more of the same" for symptom management. Instead, Dr. Gersh recommends additional types of therapy for claimant. Specifically, Dr. Gersh recommends prolonged exposure therapy and marital counseling for claimant. (Joint Ex. 1, p. 13) As of the date of the hearing, claimant had not participated in either prolonged exposure therapy or marital counseling. Presumably, Dr. Gersh recommends these additional therapies with the anticipation that they will improve claimant's symptoms and functional abilities. Such recommendations are contrary to a finding of MMI at this time.

Defendants again offer the opinions of Dr. Tranel, Dr. Carpenter, and Dr. Brooke. Dr. Tranel opines that claimant achieved MMI on October 10, 2020. He opines that claimant cannot return to teaching at his former school but that he is capable of full-time work and that regular, full-time work would be beneficial to Mr. Danilson's mental health. (Defendants' Ex. B., pp. 9-13)

Interestingly, however, in his initial report Dr. Tranel recommends additional treatment methods be implemented for claimant. Specifically, Dr. Tranel recommends prolonged exposure therapy and cognitive processing therapy, which he opines "are

both empirically supported for treating PTSD." (Defendants' Ex. B, p. 11) Additionally, in response to a specific question about marital counseling, Dr. Tranel concedes that claimant's PTSD responses could exacerbate marital problems. Dr. Tranel defers to the opinions of Therapist Stephenson about whether claimant would benefit from marital counseling as a result of the work incident. (Defendants' Ex. B, p. 12) Recommendations for prolonged exposure therapy, cognitive processing therapy, and/or marital counseling all belie the notion of MMI and suggest that additional therapies exist that may improve claimant's PTSD symptoms and render him more functional.

Defendants also produce the opinion of Dr. Carpenter. Dr. Carpenter opines that claimant requires no further treatment and no restrictions other than not returning to the Prairie schools. (Defendants' Ex. C, p. 9) Dr. Carpenter explains that returning to work in some capacity "would be most beneficial in finding the meaning and purpose necessary to recover optimal function both personally and professionally." (Defendants' Ex. C, p. 15) Accordingly, Dr. Carpenter opines that claimant has achieved MMI. (Defendants' Ex. C, p. 15; Defendants' Ex. I) Even more troubling is Dr. Carpenter's suggestion that claimant will not be able to fully improve or recover until this litigation is resolved and ended. (Defendants' Ex. I)

Finally, defendants also produce the opinions of Dr. Brooke. Dr. Brooke questions the validity of some of claimant's symptom reporting on the MMPI testing performed by Dr. Tranel. Dr. Brooke instead opines that claimant achieved MMI on October 20, 2020 and that he requires no further treatment or restrictions. (Defendants' Ex. D, p 7)

As I ponder the competing opinions relative to MMI, I do not find the opinions of Dr. Brooke to be convincing. Dr. Brooke performed only a records review. His diagnosis is the "outlier" among the medical professionals. I give no weight to his opinion in this instance.

Dr. Pospisil offered an opinion that claimant achieved MMI. However, Dr. Pospisil also indicated that she would defer to the expertise of a psychiatrist or psychologist. Opinions from other mental health professionals are in this evidentiary record. Therefore, I give the opinions of Dr. Pospisil about MMI very little weight.

Therapist Stephenson has treated claimant for approximately three years. She has intricate knowledge of claimant, his symptoms, his recovery, and his ongoing struggles. She has recommended marital counseling, which had not been performed by the date of this hearing. However, she has also offered somewhat contradictory opinions about MMI. Given that Ms. Stephenson is neither a psychologist nor a psychiatrist and has offered potentially contradictory opinions on MMI, I do not place significant weight on her opinions about MMI in this case.

Dr. Carpenter is the only board certified psychiatrist offering opinions in this case. His status as a board certified psychiatrist gives him superior credentials and entitles his opinions to significant weight. In fact, I accept and believe his opinions that a return to

work would be beneficial to claimant's recovery and return of optimal function both personally and professionally to be accurate and convincing. I believe and find that it likely would be beneficial for claimant to return to work in some capacity moving forward. However, claimant also offered credible testimony about ongoing symptoms that include difficulties with concentration, fatigue, and irritability, among other symptoms.

Given the ongoing symptoms, I tend to favor and accept the opinions of Dr. Tranel and Dr. Gersh. Dr. Tranel opined that claimant reached MMI as of October 20, 2020. However, as noted above, Dr. Tranel also offered suggestions for additional therapies that could improve claimant's symptoms and function. Specifically, Dr. Tranel recommended prolonged exposure therapy and cognitive processing therapy. (Defendants' Ex. B, p. 11) He also deferred to Ms. Stephenson about whether marital counseling could be beneficial. (Defendants' Ex. B, p. 12)

Dr. Gersh opined that claimant continues to make progress in his therapy with Ms. Stephenson. He also acknowledged the recommendation of Dr. Tranel that claimant submit to cognitive processing therapy. Dr. Gersh opined that was a good recommendation by Dr. Tranel and recommended that therapy be attempted. (Claimant's Ex. 1, pp. 5-6)

I find the opinions and recommendations made by Dr. Tranel, especially as accepted and recommended by Dr. Gersh, to be reasonable, necessary, and appropriate. I find that claimant could submit to cognitive processing therapy with the hope and expectation that it would improve his symptoms and functional abilities. Therefore, although Dr. Tranel opined that claimant was at MMI, I find that additional therapies exist that will likely improve claimant's functional and psychological abilities. I specifically find that claimant is not at MMI and that these additional therapies offer a reasonable expectation of improvement into the future.

Dr. Gersh offered Ms. Stephenson a recommendation for a workbook to learn and perform cognitive processing therapy. If she concurs it is appropriate to attempt that therapy at this time and she is willing to do so, she should be authorized to perform that therapy. If Ms. Stephenson is not willing or does not feel competent to perform cognitive processing therapy, defendants should identify a therapist or psychologist willing to assist claimant with this type of therapy.

Ms. Stephenson has also recommended marital counseling. Claimant requests an order for alternate medical care ordering marital counseling. Claimant had scheduled and was to participate in marital counseling with his wife after the date of the arbitration hearing. Given that Dr. Tranel deferred on this issue and given Ms. Stephenson's recommendation for marital counseling, I find that marital counseling is necessary, reasonable, and appropriate medical care resulting from claimant PTSD diagnosis following the events of October 25, 2018.

In other words, I find the marital counseling is a sequela of and the result of the work injury and exposure. I find that it is necessary medical care. Defendants do not

willingly authorize marital counseling as part of this claim. Therefore, I find that it is related, necessary, reasonable, and appropriate care for claimant's injuries. I find that refusing the request for marital counseling and offering nothing in its place (other than perhaps joint therapy sessions through Ms. Stephenson—something she has opined is not sufficient) is not reasonable or appropriate care. Therefore, I find that claimant has proven the defendants' refusal of marital counseling is unreasonable and a denial of reasonable, necessary and appropriate care. Claimant identified more extensive and necessary care, via marital counseling, through Keys to Living in Cedar Rapids.

Again, the notion of obtaining marital counseling suggests that further improvement of claimant's condition or coping skills is possible. This further additional care belies the notion of MMI. I specifically find that claimant has not achieved MMI as of the date of the arbitration hearing.

Finally, I note that claimant was offered the opportunity to consult with a psychiatrist to determine if there is a proper pharmacological treatment for his symptoms. Claimant was adamant throughout his treatment that he did not want medications and feared the side effects of such medications. He reiterated those concerns during his deposition. However, at trial, claimant testified he is now willing to consider medications to help manage his symptoms and improve his function. Dr. Carpenter is the only psychiatrist who has evaluated claimant. He noted the possibility of medications that could assist claimant's symptoms but dismissed the possibility because claimant had refused such treatment options previously. (Defendants' Ex. C, pp. 7, 10)

While claimant could be criticized for refusing medication management prior to the hearing and then changing his position and suggesting at hearing that he would be willing to consider the use of medications, I find claimant's testimony on the issue to be sincere and credible. Mr. Danilson had serious concerns about the side effects of medications that can increase anxiety and cause suicidal thoughts. However, Mr. Danilson testified that he has moved past such symptoms and is now willing to consider potential medications to assist with improving his symptoms and function. Again, this appears to be an avenue for treatment that should be expected to improve claimant's symptoms and function. Again, this suggests claimant is not at MMI. If Ms. Stephenson or Dr. Pospisil believe it is now appropriate to pursue the use of medications for claimant's symptoms, this should be pursued.

In reaching a finding that claimant has not yet achieved MMI, I must also find that claimant has not proven that his injuries resulted in permanent disability for purposes of his vocational rehabilitation claim. I acknowledge the competing vocational expert opinions. However, these opinions are not terribly helpful to me at this time given that I find additional treatment options exist that can and should be attempted to improve claimant's symptoms and function. I also decline to enter a finding that claimant cannot return to gainful employment. To the contrary, I find that it would be beneficial for claimant to return to gainful employment and that it remains possible, if not likely, that he will do so after further counseling and treatment.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, the initial factual dispute to be determined was the proper diagnosis for claimant's mental health condition and whether it was causally related to the alleged injury on October 25, 2018. Having found the diagnosis and opinions of Ms. Stephenson, Dr. Tranel, Dr. Carpenter, and Dr. Gersh most convincing and credible in this record, I found that claimant proved he sustained PTSD as a result of the events at work on October 25, 2018. I also accepted the opinions and diagnosis of Dr. Tranel and Dr. Gersh and found that claimant proved he also suffers from major depressive disorder. I found both diagnoses and related symptoms causally connected to or materially aggravated and worsened by the events at Prairie on October 25, 2018. Therefore, I conclude that claimant has proven he sustained a mental health injury and that the diagnoses offered by the above medical experts are related to his alleged work injury. Claimant has established a compensable work injury by a preponderance of the evidence.

The next disputed issue requires a determination of whether claimant has achieved MMI or remains in a running healing period as of the date of the arbitration hearing. His personal physician and Dr. Pospisil removed claimant from work shortly after the October 25, 2018 incident. Claimant testified convincingly that he has not returned to full-time, gainful employment and all medical experts recommend against him returning to work at Prairie. Accordingly, claimant has established that he sustained some temporary disability and defendants stipulated that the injury caused a period of temporary disability.

However, claimant asserts that he has not yet achieved MMI and that his entitlement to healing period, or temporary total disability, benefits should continue from November 9, 2018 through the date of the arbitration hearing and continuing into the future. Defendants assert that claimant has reached MMI and that healing period, or temporary total disability, benefits should end October 10, 2020 pursuant to the MMI declaration of Dr. Tranel, Dr. Pospisil, and Dr. Brooke.

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. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Temporary total disability and healing period benefits are compensated under different statutory sections but represent payment of benefits for the same purpose: lost time during a period of temporary disability. A determination of whether benefits paid or payable should be categorized as temporary disability benefits under Iowa Code section 85.33 or as healing period benefits under Iowa Code section 85.34(1) cannot be determined until it is known whether the injury causes permanent disability. Of course, a determination of whether an injury causes permanent disability is not ripe until the claimant achieves MMI. Bell Bros Heating and Air Conditioning v. Gwinn. 779 N.W.2d 193, 200 (Iowa 2010).

Therefore, the next disputed issue to determine is whether claimant has achieved MMI. In this case, I found the opinions of Dr. Tranel and Dr. Gersh to be the most credible and convincing on the issue of MMI and future treatment. Although Dr. Tranel opined that claimant had achieved MMI in October 2020, he also recommended additional forms of treatment. I found that the recommendation for additional treatment was intended to improve claimant's condition, symptoms and functional abilities. As such, I found those recommendations belied a finding of MMI.

I also accepted the opinion of Dr. Gersh. Dr. Gersh concurred that additional therapy was a good recommendation by Dr. Tranel and should occur. Dr. Gersh

specifically opined that claimant has not achieved MMI. I accepted that opinion as credible and convincing.

Ms. Stephenson also recommended marital counseling for claimant and his wife. Dr. Tranel deferred to Ms. Stephenson on this issue. I found that the recommendation for marital counseling was reasonable, necessary, and appropriate care resulting from and causally related to the October 25, 2018 work injury. Accordingly, I found that additional counseling and treatment was indicated and was likely to improve claimant's condition, symptoms, and functional abilities.

Claimant also testified at hearing that he is now willing to consider the use of medications to manage his mental health symptoms. I accepted claimant's testimony as reasonable and credible. Medication management could improve claimant's condition and suggests that MMI has not yet been achieved. Having reached these findings, I also found that claimant was not at MMI as of the date of the arbitration hearing.

Every medical expert offering an opinion has indicated that claimant cannot return to Prairie in his former position. Accordingly, claimant is not at MMI, he has not returned to work, and he is not capable of performing substantially similar work to that which he performed on October 25, 2018. Claimant established entitlement to either temporary total disability benefits or healing period benefits from November 9, 2018 through the date of the arbitration hearing and continuing until the first condition of either Iowa Code section 85.33(1) or Iowa Code section 85.34(1) is met. In other words, in common worker's compensation parlance, claimant is entitled to a "running healing period" from October 25, 2018 through the date of the arbitration hearing. Iowa Code section 85.33(1); Iowa Code section 85.34(1).

Claimant asserts a claim for permanent disability benefits. However, as noted above, a claim for permanent disability is not ripe and cannot be determined until the claimant achieves MMI. Gwinn, 779 N.W.2d at 200. Having determined that claimant has not yet achieved MMI, I conclude that the claim for permanent disability is premature and cannot be determined at this time.

Mr. Danilson also seeks reimbursement of the independent medical evaluation charges from Dr. Gersh pursuant to Iowa Code section 85.39. Nb31

The requirements of Iowa Code section 85.39 are construed strictly by the Iowa Supreme Court and must be established and met before reimbursement is required. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

Dr. Gersh is a licensed psychologist. However, he is not a physician. Under the plain language of Iowa Code section 85.39, reimbursement is only owed for an evaluation performed by a "physician." Claimant failed to establish the prerequisites of Iowa Code section 85.39 because he did not seek evaluation by a physician. I conclude that claimant's request for reimbursement of Dr. Gersh's charges fails under Iowa Code section 85.39.

Mr. Danilson also asserted a claim for alternate medical care. At the commencement of hearing, defendants acknowledged an obligation to provide ongoing care and agreed to authorize continuing treatment and therapy though Cher Stephenson, a licensed mental health counselor. Ms. Stephenson's care is, therefore, authorized pursuant to the parties' agreement. Defendants shall pay for all care through or recommended by Ms. Stephenson.

Mr. Danilson asserted a second alternate medical care claim at the time of hearing. Specifically, he requested authorization of marital counseling. The authorized therapist, Ms. Stephenson, recommended this counseling and noted that it needs to be performed by a different therapist with experience in this form of therapy. Defendants advised the undersigned at the commencement of hearing that they had searched for a provider to offer marriage counseling but had not found one. Therefore, defendants offered marriage counseling (really allowing Mrs. Danilson to attend claimant's therapy sessions) through Ms. Stephenson. This is not what Ms. Stephenson recommended, nor is it reasonable or appropriate care given the recommendations of Ms. Stephenson. In essence, defendants denied the request for additional care recommended by their authorized therapist, Ms. Stephenson.

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).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

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).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I lowa Industrial Commissioner Reports 207 (1981).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (lowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, I found that the marital counseling requested by claimant was reasonable, necessary and appropriate medical care for his injuries resulting from the October 25, 2018 work injury. Defendants declined to authorize the requested marital counseling. However, their authorized mental health counselor is the individual that recommended the counseling. Ms. Stephenson recommended it be performed by another counselor with that specific knowledge and experience. Defendants' refusal or failure to authorize marital counseling is not reasonable and does not meet the standard to provide reasonable, necessary, and appropriate care without undue inconvenience to the claimant. I specifically found that the defendants' refusal to offer marital counseling, as recommended by the authorized therapist, was not reasonable care under lowa Code section 85.27.

Moreover, claimant identified a specific mental health provider, Keys to Life, who was scheduled to meet with claimant and his wife for marital counseling shortly after the arbitration hearing. Therefore, I conclude that claimant has identified additional treatment that can and should be provided and has identified a specific medical provider for that care. The marital counseling claimant has identified and arranged is superior to and more extensive than the care being offered by defendants.

For each of these reasons, I conclude that Mr. Danilson has proven entitlement to an order for alternate medical care. Specifically, he is entitled to additional medical care through or at the direction and recommendation of Ms. Stephenson, including potential medication management and the additional treatment modalities recommended by Dr. Tranel and Dr. Gersh, if Ms. Stephenson concurs and believes those are appropriate. Additionally, I conclude that claimant has proven entitlement to marital counseling for he and his wife through Keys to Living in Cedar Rapids, lowa.

Claimant also asserted a claim for vocational benefits pursuant to lowa Code section 85.70. lowa Code section 85.70(1) provides for the payment of an additional $100.00 in weekly benefits for a period of 13 weeks and, at the discretion of the agency, renewable for an additional 13 weeks (a potential total of 26 weeks of increased benefits). The benefits payable pursuant to lowa Code section 85.70(1) are payable for an employee "who has sustained an injury resulting in permanent partial or permanent

total disability. Claimant must also prove that he "cannot return to gainful employment because of such disability." Iowa Code section 85.70(1).

In this instance, I have already concluded that claimant remains in a running healing period. Since claimant has not yet achieved MMI, it is not possible or ripe to determine whether he has sustained permanent disability. Gwinn, 779 N.W.2d at 200. Given that a determination of whether claimant sustained permanent disability is not yet ripe, claimant cannot establish the prerequisites of Iowa Code section 85.70(1) at this time. Claimant's request for vocational weekly benefit payments pursuant to Iowa Code section 85.70(1) is denied at this time because it is not ripe for determination.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed on the main substantive issue in the case. I conclude it is appropriate to assess his costs in some amount.

Claimant lists his requested costs at Claimant's Exhibit 7. He seeks assessment of his filing fee ($100.00) and service fees ($13.80). Both of these are reasonable costs and are assessed pursuant to 876 IAC 4.33(3) and (7).

Mr. Danilson requests that the expense ($200.00) of a report from Cher Stephenson be assessed. He also seeks to have the cost ($1,625.00) of an independent medical evaluation report prepared by Dr. Gersh assessed, as well as the cost of his vocational expert's report ($1,864.00).

Given my findings and conclusions that claimant has not achieved MMI, I did not ultimately consider or rely upon any vocational reports because the issue of permanent disability is not yet ripe. Accordingly, I did not find the report or opinions of Ms. Laughlin to be insightful or helpful in any way at this stage of the litigation. I conclude it would not be appropriate to assess any of her expenses as a cost.

However, agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." The Iowa Supreme Court has considered and interpreted this rule. The Court permits only the cost of drafting the report, in lieu of the medical practitioner testifying live or via deposition, to be assessed as a cost under 876 IAC 4.33(6). Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Review of Ms. Stephenson's invoice letter suggests that the charges incurred were for a 30-minute conference for counsel to discuss the case with Ms. Stephenson. (Claimant's Ex. 7, p. 126) Although that conference did result in Ms. Stephenson checking some yes or no questions and providing a signature the day after the January 13, 2021 conference, it appears that Ms. Stephenson's charges were for the 30-minute conference she attended with counsel. Nothing in the Young case suggests that charges for an attorney-provider conference are taxable costs under 876 IAC 4.33(6). I decline to tax these requested costs.

Dr. Gersh's invoice, on the other hand, itemizes his charges. Dr. Gersh charged $375.00 for preparation of his report. (Claimant's Ex. 7, p. 127) This is a taxable cost under 876 IAC 4.33(6). I find Dr. Gersh's charges to be reasonable and I relied upon Dr. Gersh's opinions in finding that claimant is not at MMI and has viable additional treatment options. Therefore, I tax $375.00 of Dr. Gersh's report expense as a cost pursuant to 876 IAC 4.33(6).

Finally, Mr. Danilson requests that his deposition expense be taxed as a cost. Transcription charges are potential costs that can be taxed pursuant to 876 IAC 4.33(2). However, in this instance, I found much of the deposition testimony to be repetitious of trial testimony. While the deposition had relevance and provided some additional information, I conclude that it was unnecessary to include the deposition transcript as an exhibit. I decline to assess the cost of claimant's deposition transcript as a cost. Therefore, I assess costs totaling $488.80.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant temporary total disability benefits from November 9, 2018 through the date of the arbitration hearing and continuing into the future until claimant returns to work, is capable of performing substantially similar employment, or achieves maximum medical improvement, whichever shall occur first.

All weekly benefits shall be payable at the stipulated rate of eight hundred ninety-three and 90/100 dollars ($893.90) per week.

Defendants are entitled to the stipulated credit for weekly benefits paid to claimant against the award of temporary total disability benefits.

If additional weekly benefits are owed after the aforementioned credits are taken and applied, all additional accrued benefits shall be paid in lump sum and interest shall be payable on the accrued weekly benefits at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Continued mental health therapy or treatment is authorized through or at the referral of Cher Stephenson, LMHC.

Defendants shall pay for all causally related mental health therapy or treatment performed through or at the referral of Cher Stephenson, LMHC.

Future medication management is authorized through Dr. Pospisil or through a referral to a psychiatrist by either Dr. Pospisil or Ms. Stephenson, if deemed medically appropriate by either of those providers.

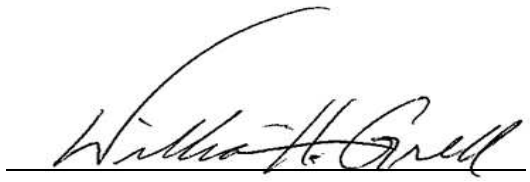
Marital counseling is authorized through Keys to Life in Cedar Rapids, Iowa.

Defendants shall pay for the martial counseling through Keys to Life.

Defendants shall reimburse claimant's costs totaling four hundred eighty-eight and 80/100 dollars ($488.80).

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

Signed and filed this __24th___ day of January, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Mark Woollums (via WCES)

Edward Rose (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.