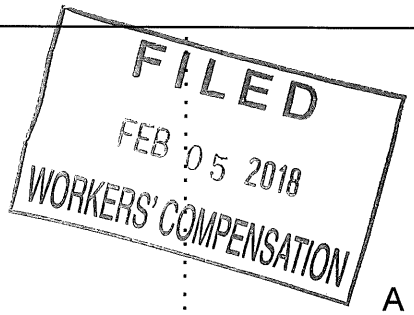
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



AUGUST HUMBLE, Claimant, vs. WAL-MART STORES, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5054952 ARBITRATION DECISION Head Note Nos.: 1802; 2204; 2500 2502

STATEMENT OF THE CASE

August Humble, claimant, filed a petition in arbitration seeking workers' compensation benefits against Wal-Mart Stores, Inc., employer, and New Hampshire Insurance Company, insurer, for accepted and alleged work injury dated June 26, 2014.

This case was heard on November 29, 2017, in Des Moines, Iowa. The case was considered fully submitted on December 20, 2017 upon the simultaneous filing briefs.

The record consists of joint exhibits 1-5, claimant's exhibits 1-8, defendants' exhibits A-G, and the testimony of claimant and Tammy Humble.

ISSUES

1. Whether claimant sustained a work-related mental aggravation;

2. The appropriate commencement date for any benefits relative to the alleged permanent medical condition; and,

3. The extent of any permanent industrial disability; and,

4. Whether claimant is entitled to a reimbursement for the cost of Dr. Walker's report.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties have stipulated the claimant sustained a physical injury arising out of a work incident of June 26, 2014. They agreed that the weekly benefit rate is $668.44 based on an average weekly wage of $1,048.08 while married and entitled to three exemptions. Fifty (50) weeks of permanency benefits in the amount of $668.44 per week for a total of $33,422.00 have been paid. Defendants agreed to reimburse the claimant for prescription medication prescribed by Dr. Throunan on November 23, 2016.

FINDINGS OF FACT

Claimant, August Humble, was a 61 year old person at the time of the hearing. At all relevant times, claimant was married and entitled to three exemptions.

His educational history includes two years studying electrical engineering followed by a college degree in business administration with a management emphasis obtained in 1990.

His work experience includes retail grocery store management, restaurant assistant management, retail store management and many years as an assistant manager or store manager for the defendant employer.

Claimant was originally hired by the defendant employer 1984. In 1996 claimant fell from a ladder while at work fracturing his wrist and sustaining a concussion. Claimant testified that he was only off of work for a couple of months, did not receive any impairment rating due to his concussion nor did he experience any ongoing symptoms following the concussion. He was not given any work restrictions and he was able to return to full duty work. He left the employment of the defendant employer to return to school. After his graduation, he worked in human resources for a hospital, and sales for a radio station, assisted in a startup clothing business, and as a business advisor for a small business owner. In 1997, claimant returned to the defendant employer where he was initially employed as an assistant manager. He earned approximately $50,000.00 in this position.

He was promoted and moved to West Bend, Wisconsin to assist in opening up a super center. Claimant was a co-manager at the store earning approximately $55,000.00.

From 1998 to 2000, claimant worked for a different big-box store as a manager and when his position was eliminated, he returned to defendant employer, initially as a co-manager.

In 2002 claimant was promoted to store manager, a position he held for 12 years. His highest salary in this position was $80,000.00 with an additional bonus of approximately $40,000.00-$45,000.00 per year. Claimant stepped down from this position in 2014 to become an assistant store manager, a position he held at the time of the hearing.

The decision to step down from store manager to assistant manager was made before his injury and because he wanted to spend more time with his family and reduce the stress. There were also changes occurring within the company the claimant was not comfortable with.

On or about June 26, 2014, claimant was working as an overnight assistant. He was unloading a truck with an electric pallet jack. He struck a pole, releasing a bungee strap. The strap struck claimant on the left eyebrow. He remembers sliding to the ground and then blacking out, awakening to a co-worker inquiring about his status.

Briefly, claimant had fatigue, anxiety, chest complaints, high blood pressure, high cholesterol and complaints of pain in the neck and right shoulder prior to the date of his work injury. Claimant was taking Lexapro for anxiety as well as trazodone for sleep as recently as May 2014, a month before the work injury. (Joint Exhibit 1:11)

On June 26, 2014, claimant was taken to the emergency room where he complained of pain above the left eye. (JE 2:29) A CT of the head, cervical spine and facial bones were all normal. He was given instructions on post concussion protocol, taken off of work for two days, instructed to engage in activity as tolerated. (JE 2:30)

He followed up with his family physician, Kirk D. Prodzinski, D.O., on June 30, 2014. (JE 1:11) He complained of intermittent headaches, intermittent dizziness, some improvement, but did not feel like he could return to work. (JE 1:11) Dr. Prodzinski took him off of work for another week out of a concern claimant may be at risk of falling. (JE 1:12)

On July 15, 2014, claimant returned to Winneshiek Medical Center, complaining of pain on the left side of the forehead that worsens as the day progresses. He also reported dizziness, headaches, light sensitivity to the left side, and excess sleepiness. (JE 2:31) Claimant was diagnosed as suffering from post-concussive symptoms that were resolving slowly. He was encouraged to return to work but limit his shifts to eight hours with 10 pounds lifting, carrying, pushing, and pulling restrictions. (JE 2:32)

Claimant returned to his family practice clinic on July 28, 2014, upset that he could not be seen at a scheduled appointment with the workers' compensation approved doctor. (JE 1:13) He complained of worsening headaches that were waking

him in his sleep, random dizzy spells, vertigo and instability. (JE 1:13) He was advised to follow up with the physician the following day. (JE 1:13).

Dr. Prodzinski saw him on July 29, 2014, and explained to the claimant that he could take another month before significant improvements would be seen. Dr. Prodzinski prescribed Topamax to address the vascular headache and continued the work restrictions. (JE 1.15)

Claimant was seen by nurse practitioner Paris on August 1, 2014. The complaints he had were unchanged, although he did feel that his condition may be worsening. On Saturday and Sunday night he woke with a migraine and threw up. (JE 2:37) He was diagnosed with post-concussive syndrome again. Nurse practitioner Paris wanted to obtain new imaging before making further recommendations. He was kept on his work restrictions and encouraged to take Tylenol or ibuprofen as needed for pain. (JE 2:39)

When he returned on August 12, 2014, nurse practitioner Paris recommended that claimant be seen by a neurologist for further management despite the repeat head CT which was negative for any injury. (JE 2:42)

Claimant reported to the emergency room on September 1, 2014, for complaints of dizziness. (JE 2:43) Larry Barthel, M.D., the emergency room physician, noted that the symptoms were consistent with claimant's post-concussive condition. It was recommended claimant rest and follow up with his regular health care provider. (JE 2:43)

On September 11, 2014, claimant began care with Marsha Horwitz, M.D., who found him to be suffering from a post-concussion syndrome and vestibular concussion syndrome. (JE 4:49) Dr. Horwitz recommended a week off of work and vestibular physical therapy. (JE 4:53)

Claimant began physical therapy on October 23, 2014. (JE 5:123) Claimant testified that physical therapy helped him manage his vertigo. In the therapy notes, the therapist recorded improvement. On November 7, 2014, the therapist wrote that the claimant had been performing most of his work tasks. (JE 5:126) On November 17, 2014, claimant felt his dizziness was decreasing.

On January 19, 2015, claimant returned to Dr. Horwitz reporting that while claimant had achieved some improvement, strenuous activities at work aggravated vertigo and headaches. (JE 4:59) Dr. Horwitz instructed claimant to return to a full duty shift but to avoid working at heights or on ladders. (JE4:59)

Therapy continued until March 19, 2015, when it was determined claimant had plateaued. (JE 5:130) On March 27, 2015, claimant returned to Dr. Horwitz.

> He continues to have episodes of vertigo triggered by head movement, particularly side-to-side movement. This remains a problem in

> spite of receiving vestibular physical therapy, 14 visits from October 24, 2014 through March 16, 2015. He reports persistent motion sensitivity with vertigo. His vestibular therapist has continued to monitor his motion sensitivity which has fluctuated greatly from 49% at the time of initial evaluation to the most recent sensitivity level of 88%. His motion sensitivity has ranged from 33% to 66% at various times.
>
> He continues to work full time, trying to modify his movements to reduce the frequency of episodes of vertigo.

(Ex. 4:62)

Claimant saw Dr. Horwitz again on June 12, 2015. (JE 4:66) His condition was unchanged. (JE 4:66) Moving up and down ladders, bouncing in a forklift, standing up, and bending down triggered his vertigo. (JE 4:66) Dr. Horwitz believed that over time, claimant's symptoms would diminish. Claimant was to taper off his Depakote but continue with the vestibular home exercises given by the therapist. (JE 4:66) Claimant was released but instructed to return as needed.

On September 10, 2015, Erin Kennedy, M.D., reviewed the medical records of the claimant at the request of the defendants. (Ex. G) Dr. Kennedy agreed claimant sustained post-concussive syndrome resulting in headaches and vertigo as a result of the work incident. (Ex. G) She noted that the vestibular therapy resulted in improvement but not full resolution. After the medical record review, Dr. Kennedy examined the claimant on September 20, 2015. During this examination the claimant reported his biggest concern was vertigo which he continued to experience for approximately 80 percent of his workday. He noted that the vertigo worsened as he engaged in more activity. The severity of the headaches correlated with the severity of the vertigo. (Ex. G: 42)

> August Humble is a 59 year old gentleman, who is the assistant manager at Wal-mart, who sustained traumatic impact to the left side of his skull when he was struck by a bungee cord on June 26, 2014. He had postconcussive symptoms with headache and vertigo persisting. He has been managed medically with medication with placed restrictions and therapy. Though symptoms have improved, they have not fully resolved. He was not specifically placed at maximum medical improvement, though he has returned to full and unrestricted duty. He presents for permanent partial impairment related to this injury.

(JE 4:71)

Dr. Kennedy's examination revealed, "He was able to walk at a normal pace to the examination room and move about the examination room with ease. He was able to participate fully in exam and did not decline any component of the exam." (Ex. JE 4:71)

Dr. Kennedy concluded the appropriate maximum medical improvement (MMI) date was June 26, 2015, one year the date of the injury. She did not believe claimant needed further treatment and assigned 5 percent impairment to the whole person solely on the vestibular disorder. (Ex. G: 44)

At the request of the claimant, a new appointment was set up with Dr. Horwitz to treat ongoing symptoms of vertigo and headaches. (JE 4:78) Dr. Horwitz referred claimant to an ENT. On June 30, 2016, claimant saw Timothy A. King, M.D. (JE 4:81) Dr. King ordered a videonystagmography which was performed on August 10, 2016. (JE 4:85) The test was not completed as claimant became very tense and reactive. "He almost rolled off the table to the left each irrigation. He was very sick after testing and unable to walk for approximately 20 mins." (JE 4:85-86)

Claimant was returned to Dr. Horwitz's office where he was seen by Leah Thronaum, D.O., on November 23, 2016. (JE 4:87) Dr. Thronaum ordered a brain MRI, more therapy, and medications including one for sleep and mood issues. (JE 4:87) He was allowed to return to work with no restrictions. The MRI of the brain was conducted on February 16, 2017, which revealed no acute findings. (JE 4:97) When claimant returned to Dr. Thronaum's office, he was seen by Preeti Joseph, M.D., instead. Dr. Joseph included depression in his diagnosis of claimant. Claimant was instructed to return in three months.

On February 15, 2016, claimant underwent an independent medical evaluation with Irving L. Wolfe, D.O. (Ex. 7:1) Dr. Wolf is a doctor of osteopathy specializing in neurology and acupuncture. (Ex. 7:1) Dr. Walker recorded the following symptoms as related by claimant:

> Mr. Humble was asked what current symptoms he is having that he relates to the work-related injury of June 26, 2014. Mr. Humble told me that he has balance issues and vertigo. Directional changes including looking up, down, or to the sides, climbing ladders, the bouncing motion of riding on a forklift, playing golf, amusement rides, hiking, any type of ball sports, yard work, sudden directional changes, swaying objects such as the movement of his pastor when he gives his Sunday sermon, the sun reflecting off windows, and bright automobile lights all cause a sensation of spinning and imbalance. Associated with these are headaches which are in the left frontal region. Mr. Humble told me that his postconcussion migraine headaches have resolved. The headaches that he has now occur solely in association with his vertigo. All of these are associated with vertigo. They do not occur independently. On a 0-10 pain scale, they can approach an 8 or 9/10. Headlights, flashlights, or noise will increase the headache if it has begun. Mr. Humble notes that he can have noise confusion due to multiple background noises. With his dizziness and vertigo, he will have visual impairments especially with bright lights, fog, or falling snow. Emotionally, he is more emotionally sensitive. The more intense the vertigo, the more emotionally vulnerable he can be and may

> cry. Psychologically, he feels that there will be no end to his symptoms and worries that he will not make it home some nights due to the vertigo and headaches leaving his family without a means of economic security. Mr. Humble told me that he needs to be mindful of where his body is in space and to be mindful of actions and activities which might bring on an imbalance/vertiginous spell which will then bring on a headache. His episodes can last an hour or they may last 24 hours.

(Ex. 7:9) Claimant's physical examination was largely normal although he exhibited some difficulty with the tandem gait and the Romberg Testing. (Ex 7:12) Dr. Wolfe diagnosed claimant with mild traumatic brain injury and ascribed a 14 percent impairment of the whole person as a result of the work-related injury. (Ex. 7: 13) He set the MMI date as June 26, 2015, one year post injury. (Ex. 7:14) As for restrictions, Dr. Wolfe opined:

> Answer: It is my medical opinion within a reasonable degree of medical certainty that Mr. Humble needs to be cautious and mindful when attempting to perform any and all activities which may produce an episode vertigo/dizziness. These are to include ladder climbing, quick positional changes of body or neck, quick positional changes of bending at the waist, activities which produce vibrations or rocking, changing of body position too quickly such as standing up from a chair or rising to a standing position from a lying position.

(Ex. 7:15) Dr. Wolfe did not address the issue of depression and/or anxiety until asked about it in a follow–up letter. He agreed, via a checklist, that the claimant's symptoms of depression and anxiety would continue so long as claimant's vertigo existed. (Ex. 7:16)

On December 2, 2016, claimant was seen by a neuropsychologist, John Walker, Psy.D., for a second opinion. (Ex. 8) The psychological test indicated symptom overreporting but Dr. Walker diagnosed claimant with post-concussive symptoms, adjustment disorder and mixed emotional features. (Ex. 8:8) While the concussion had resolved, claimant still suffered from depression, anxiety, irritability, dizziness and vertigo. (Ex. 8:9) Dr. Walker did not assign permanent restrictions either and set the MMI date as of the date of the examination but recommended six cognitive behavioral psychotherapy visits. (Ex 8:9)

On December 21, 2016, claimant was examined by Daniel Tranel, M.D., at the request defendants. (Ex. F) Dr. Tranel determined that there was no brain damage but that the claimant's ongoing symptomatology negatively impacted his quality of life and that the claimant developed depression and anxiety arising out of the work incident. (Ex. F:35)

> Our evaluation indicates that Mr. Humble has become highly entrenched in these post-accident problems (dizziness, vertigo), to an extent that exacerbates the problems and limits his activities and daily

> functioning more than need be the case. Our testing indicates that he has a high degree of somatic focus (supporting a DSM-5 diagnosis of Somatic Symptom Disorder, 300.82), with constant worry about health-related issues. This is not to deny the reality of his post-accident problems with dizziness and vertigo, which are significant symptoms that appear to have been caused by the June 2014 accident. Rather, our point is that Mr. Humble could be considerably more functional and engaged in his life, were he to reduce his somatic rumination and extreme focus on health concerns.

(Ex. F:35) Dr. Tranel was concerned claimant was not compliant with medications and suggested a primary care physician review the medications carefully. (Ex F:35) Dr. Tranel did suggest that some of the claimant's depression and anxiety was self-inflicted and that if the claimant would focus less on those negative thoughts, the mental issues could improve. Dr. Tranel did not assign any restrictions or impairment. (Ex. F)

Claimant has been referred for a second vestibular opinion with the Mayo Clinic.

Claimant continues to suffer from vertigo and dizziness. In 2014, claimant grew dizzy stocking freight and fell over. He failed the videonystagmography because he had difficulty focusing on the target. Irrigation of his eyes caused him to nearly roll off the table during testing and he became ill afterward.

When his vertigo gets bad, he becomes fearful that he will be injured. He does not feel it is appropriate to drive when he is beset with vertigo. At times, claimant has pulled over on the way to work and called in to his manager to report that he would be late. Claimant would then wait until he had recovered from the vertigo to continue to work. Snow, high winds, lights can increase his vertigo while driving.

Claimant will commonly self-limit his activities as a result, both at home and at work. He often avoids ladders, does not use the electric pallet jack or the scissor lift due to those machines inducing or aggravating his vertigo. Claimant continues to golf, despite the swinging and head motions associated with the game. Some activities such as rides at an amusement park trigger his symptoms and limit his socialization with his family. Playing video games or even watching video games being played can be problematic. Mowing the lawn can also stir symptoms.

Claimant testified that if he adopted the work restrictions of Dr. Wolfe, he would not be able to execute the essential duties of his position with the defendant employer.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the

employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

While defendants argue that claimant did not sustain any mental injury arising out of the work incident of June 26, 2014, there is scant evidence supporting their argument. Instead, the overwhelming weight of the evidence is that claimant developed anxiety and depression arising out of his ongoing physical symptomatology of vertigo, dizziness, and headaches. There was no credible expert testimony to the contrary. Of the medical experts that gave opinions on the topic of depression and anxiety, Drs. Tranel, Wolfe, and Walker agreed claimant's depression and anxiety symptomatology post the work injury were related to that work injury.

While claimant does have a pre-existing history of anxiety and sleep issues and had been taking medication to treat both shortly before the work injury, the preponderance of the evidence supports the claimant's argument that his current depression and anxiety were directly associated with his work injury and the physical symptoms that lingered as a result of that work injury.

Therefore, it is found claimant has sustained a mental injury arising out of and in the course of his employment. As a result of this finding, medical care to treat claimant's anxiety and depression is the responsibility of the defendants.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants have denied the mental injury and therefore do not retain the right to direct this care. Claimant is entitled to seek out the care and treatment for his anxiety and depression including but not limited to psychotherapy, medical therapy, and any other therapy that is reasonable.

The extent of the claimant's injury is the next issue.

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

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

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant is currently employed by defendant employer, in the same position as he was prior to his injury. Claimant had reduced his role from store manager to assistant manager prior to the injury and for reasons unrelated to any physical condition. He is able to do most of his assigned tasks but has difficulty working on ladders, at heights, and when bending and rising quickly.

Dr. Wolfe assigned a 14 percent impairment of the whole person based on his diagnosis of a closed head injury using Table 13-3, Criteria for Rating Impairment due to Episodic Loss of Consciousness or Awareness which allows for an impairment of zero to 14 percent. Dr. Wolfe is the only medical professional who concluded claimant had a closed head injury which is not the finding of the undersigned. Instead, the consistent diagnosis has been claimant suffers from a vestibular disorder. Further, there is little evidence that claimant suffered any episodic loss of consciousness or awareness. He may have sustained one instance of consciousness but the episodes of vertigo do not appear to fall under that category. Dr. Wolfe's ratings are given low rating as a result. While Dr. Kennedy assigned only a 5 percent impairment, her impairment was based solely on the vertigo issues and not counting the depression and anxiety.

Claimant does have a mental injury, but there are no work restrictions as a result of that injury nor is there evidence that the mental injury is impacting his employability. None of the experts who agreed that claimant sustained depression and anxiety assigned any work restrictions as a result. Nor did any of those experts indicate that claimant's employability was impacted by the mental injury. Claimant self-limits at work and certain tasks such as driving, changing levels quickly, and use of a ladder can exacerbate his vertigo. Further, he believes that he could be terminated from his position due to his inability to perform certain tasks at work.

Claimant has a long history of working in retail as a manager which requires leadership, management of staff, customer engagement and service along with the physical duties. He is college educated and has held a managerial position for most of his relevant work history.

As a result of the foregoing, it is determined claimant has sustained a 10 percent impairment of the whole person. Per the stipulations, defendants have paid this impairment rating and therefore no further permanent benefits are owed at this time.

The next issue is the commencement date of permanent partial disability benefits.

Section 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 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. Section 85.34.

Claimant returned to regular duty work on September 22, 2014. (JE 4:53) Dr. Kennedy, an independent medical examiner selected by the defendants, and Dr. Wolfe, an independent medical examiner selected by the claimant, set the MMI date as one year after the date of the injury. Claimant argues, however, that the appropriate date of MMI is October 27, 2017, due to claimant's mental health condition. However, if subsection one and two of section 85.34(1) are not met, the appropriate test is the period during which there is a reasonable expectation of improvement, not the period during which claimant's condition persists. In this case, however, subsection 1 was met in September 22, 2014, when claimant returned to work and therefore, claimant's permanent partial disability benefits commence on September 22, 2014.

Finally, claimant seeks reimbursement for the examination of Dr. Walker and a consultation with Tom Whetston, P.A., claimant's treating physician. Alternatively, claimant seeks reimbursement under Iowa Code section 85.39; however, claimant has already been reimbursed for one IME. He is not entitled to a second. Kohlhaas v. Hog Slat, Inc., 777 NW 2d 387, 394 (Iowa 2009) (finding that a second IME is not appropriate even in a review-reopening without a prior evaluation)

Iowa Administrative Code 876-4.33 allows for the taxation of medical reports. Under this rule, the assessment of costs under section 86.40 include "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Iowa Admin. Code r. 876-4.33. These medical reports have been characterized as evidence in lieu of actual testimony. In Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015), the Supreme Court stated as follows:

> A medical report for purposes of a hearing is aligned with a prehearing medical deposition. In 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.

Id. Therefore the consultation and the examination are not appropriate costs to be taxed. It is not clear from the invoice what portion of the bill from Dr. Walker is for the report and what portion is for the "comprehensive interview, testing and scoring." (See Costs attached to Hearing Report) The entire bill is $4,500.00 for 13 hours of work at $350.00 per hour. The examination took one hour and 10 minutes. The evaluation included a medical record review. The report is 10 pages long. Taking all those factors into consideration, it is determined that one quarter of the bill can be appropriately taxed as a cost for the report itself.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred sixty-eight and 44/100 dollars ($668.44) per week from September 22, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

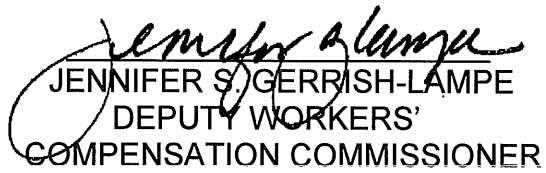
That defendants are to be given credit for benefits previously paid.

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

That defendants shall reimburse or pay directly the medical expenses associated with claimant's depression and anxiety.

That defendants shall pay one thousand one hundred twenty-five and no/100 dollars ($1,125.00) of the total invoice of Dr. Walker as a cost in this matter pursuant to rule 876 IAC 4.33, in addition to the filing fee.

Signed and filed this 5th day of February, 2018.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Nicholas L Shaull
Attorney at Law
2423 Ingersoll Avenue
Des Moines, IA 50312
Nick.Shaull@sbsattorneys.com

Michael S. Roling
Alison Stewart
Attorneys at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
mike.roling@peddicord-law.com
alison@peddicord.law

JGL/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.