BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CORY WURTZEL, Claimant, vs. A+ LAWN & LANDSCAPE, INC., Employer, and COMMERCE & INDUSTRY INSURANCE CO., Insurance Carrier, Defendants.	File No. 5060139 A R B I T R A T I O N D E C I S I O N Head Notes: 1802, 1803, 2500, 3002, 3400

CORY WURTZEL, Claimant, vs. A+ LAWN & LANDSCAPE, INC., Employer, and AMGUARD INSURANCE CO. Insurance Carrier, Defendants.	File Nos. 5060140, 5066566 A R B I T R A T I O N D E C I S I O N Head Notes: 1802, 1803, 2500, 3002, 3400, 1703

STATEMENT OF THE CASE

Cory Wurtzel, claimant, filed three petitions in arbitration seeking workers' compensation benefits from his employer A+ Lawn & Landscaping Inc. (A+) and Amguard Insurance Company (Amguard) and Commerce & Industry Insurance

Company (C & I) as a result of an in injury he sustained on May 11, 2016 and alleged injuries on September 7, 2017 and April 26, 2018.

This case was heard in Des Moines, Iowa on February 12, 2020 and fully submitted on April 1, 2020. The evidence in this case consists of the testimony of claimant, Brandy Wurtzel, Joint Exhibits 1 - 11, Defendants A+ and C & I Exhibits A – K, Defendants A+ and Amguard Exhibits AA – CC and A - K and Claimant's Exhibits 1 - 25. Administrative notice was taken of the application for order under Iowa Code section 85.21 filed on June 25, 2018 pursuant to Iowa Code 85.21, which was filed on June 25, 2018 and the order filed on July 18, 2018 in File No. 5060139.

Pursuant to an order during the arbitration hearing, A+ and C & I filed a supplement statement and exhibit concerning payment of certain medical expenses. The statement and exhibit was admitted into the record as Exhibit L. All parties submitted briefs.

The parties filed hearing reports for each file number at the commencement of the arbitration hearing. On the hearing reports, 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.

ISSUES

For File No. 5060139 (D/O/I: 05/11/16)

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. The extent of claimant's disability.
4. Commencement date for any permanent partial disability benefits.
5. The claimant's average weekly wage and the resulting weekly workers' compensation rate.
6. Whether claimant is entitled to payment for medical expenses.
7. Whether claimant is entitled to payment for an independent medical examination.
8. Whether penalty should be assessed.
9. Assessment of costs.

ISSUES

For File No. 5060140 (D/O/I: 09/07/17)

1. Whether claimant sustained an injury on September 7, 2017, which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so,
3. The extent of the temporary disability;

4. Whether the alleged injury is a cause of permanent disability and, if so;
5. The extent of claimant's disability.
6. The claimant's average weekly wage, number of exemptions and the resulting weekly workers' compensation rate.
7. Whether claimant is entitled to payment of certain medical expenses.
8. Whether claimant is entitled to payment for an independent medical examination.
9. Whether penalty should be assessed.
10. Assessment of costs.

ISSUES

For File No. 5066566 (D/O/I: 04/26/18)

1. Whether claimant sustained an injury on April 26, 2018 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so;
3. The extent of temporary disability;
4. Whether the alleged injury is a cause of permanent disability and, if so;
5. The extent of claimant's disability.
6. The claimant's average weekly wage, number of exemptions and the resulting weekly workers' compensation rate.
7. Whether claimant is entitled to payment of certain medical expenses.
8. Whether claimant is entitled to payment for an independent medical examination.
9. Whether penalty should be assessed.
10. Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Cory Wurtzel was 40 years old at the time of the hearing. Claimant dropped out of school in about 10th grade. (Transcript page 45) Claimant attempted to obtain a GED at a community college, but has not completed the program and obtained his GED. (Tr. p. 46; Exhibit 1, p. 1) Claimant put on his application for employment at A+ that he had a GED. (Ex. 2, p. 5) Claimant testified that he has one of his children living with him. (Tr. p. 52) Claimant claimed this child on his 2016 tax return. (Ex. 15, p. 69)

Claimant's work history shows that after he left school in the 10th grade claimant worked in fast food, lawn care, as a forklift driver, buffing, and assembly among other work. (Ex. 1, p. 2) Claimant had some supervisor responsibility when he worked at the North Iowa Vocational Center. (Tr. p. 125)

Claimant started working for A+ in March 2013. (Tr. p. 51) Claimant was hired as an irrigation service tech. Claimant said that his busy time at work started in April, when water could be put into the irrigation systems, then would slow down during the

summer and pick up in October when irrigation shut-downs were performed. (Tr. pp. 55, 56) The work was seasonal and he would be laid off during the winter and collect unemployment insurance. (Tr. p. 57) Claimant also put up Christmas decorations for A+. Claimant would be laid off during the winter, but would be called in for snow plowing. (Tr. p. 57) Claimant testified that he was a salaried employee. (Tr. p. 55) When working, claimant would receive his salary for 40 hours of work and then would receive straight time for hours over 40. (Tr. p. 61) Claimant's regular salary at the time of his May 11, 2016 injury was $560.00 per week. (Tr. p. 61; Ex 13, p. 54) Claimant received pay for time over 40 hours and a production commission when he reached a certain dollar amount at the end of the week. (Tr. p. 62)

Claimant testified as a salaried employee he was not paid overtime. (Tr. p. 61) Claimant was expected to be available for snow plowing in the winter. Claimant testified he would receive additional pay when he worked more than 40 hours a week, however the pay was straight time, not time and one half. (Tr. p. 62) Claimant testified that when he was called into work in the winter his pay rate was $15.00 per hour, but he was paid $7.50 and the other half of his pay was banked and paid out later. (Tr. p. 65)

Claimant testified that immediately prior to the May 11, 2016 injury he had no back problem that impacted his work. (Tr. p. 70)

In his statement of October 23, 2017 claimant sad he was paid $630.00 per week. (Ex. 7, p. 26)

Immediately before his May 11, 2016 injury claimant was paid a salary plus an hourly rate for work beyond 40 hours a week. He would regularly be paid the salary plus hourly work both before and after his May 11, 2016 injury. I find that claimant's customary wages included salary plus additional hourly wages at the time of his May 11, 2016 injury.

On May 11, 2016 claimant was at a customer's house performing a backflow test when he tripped and fell on some stairs. (Tr. p. 71; Ex. 3, p. 9) Claimant felt pain in both legs and back. (Tr. p. 72) Claimant said he was not immediately able to get up and he called his supervisor, Ethan Dykstra for assistance. (Ex. F, p. 44) Mr. Dykstra helped claimant into a pickup truck and left his service truck at the job site, as claimant could not drive. (Ex. F, p. 44) Claimant and Mr. Dykstra attempted to find a chiropractor to treat claimant and were unsuccessful. (Tr. p. 72) Claimant and his wife found a chiropractor through the internet. Claimant was seen at LaBounty Family Chiropractic. Claimant testified that he had to crawl into this office. (Ex. F, p. 44) The chiropractor informed claimant that due to his pain he should see the primary care physician, Mukti Aich, M.D. (Tr. p. 73) Claimant literally crawled into Dr. Aich's office. (Tr. p. 130; JE 2, p. 8) Dr. Aich referred claimant to the emergency department where claimant received a shot for his pain. (Tr. p. 74) Claimant was off work for two weeks. He received his regular wages while off work. (Tr. p. 74)

On May 23, 2016 claimant was referred to DoctorsNow by his employer to be evaluated concerning return to work. (Tr. p. 75; Ex. 7, p. 30) The notes of that visit

state that claimant was requesting a return to work. (JE 5, p. 87) Claimant reported to DoctorsNow that he still had pain, but the pain had decreased greatly from his injury. (JE 5, p. 87) Claimant was released to work with restrictions of no digging. (JE 5, p. 88) Claimant was seen on June 1, 2016 at DoctorsNow. At that visit claimant was released from care and returned to full duty with no restrictions. (Tr. p. 115) The claimant was deemed to be at maximum medical improvement (MMI). (JE 5, p. 90)

Claimant testified that he was in pain when he returned to work and the pain in his leg was excruciating. (Tr. p. 77) Claimant continued to receive treatment from LaBounty Family Chiropractic, but stopped due to the costs. (Tr. p. 77) Claimant purchased a back brace in the summer of 2016 for his back pain. (Tr. p. 78) Claimant continued working for A+ through the regular season until winter lay-off and started regular work in the Spring of 2017.

Claimant's primary care physician ordered a lumbar MRI, which was performed in June of 2017. (Tr. p. 80) On July 17, 2017 claimant went to Metro Anesthesia & Pain Management for the pain due to his May 2016 injury. Claimant had two injections in his back in July 2017 and one in September 2017. (JE 6 pp. 108, 113, 118) Claimant said the injections did not help. (Tr. p. 81) Claimant was receiving pain medications in July 2017 and was on pain medication at the time he reported a September 7, 2017 injury. (Tr. p. 137)

Claimant testified that he had discussions with Mr. Dykstra concerning his back and was told to fill out an incident report if he felt pain or not normal. (Tr. p. 83; Ex. F, p. 48) Claimant filled out an injury report on September 7, 2017 and September 18, 2017 concerning back pain. (Tr. p. 83; Ex 4, p. 10; Ex. A, pp. 1, 2)

Claimant went to DoctorsNow on September 7, 2017. The triage notes state,

- Back pain –Lower Back: patient injured back at work in May 2016, pain has since gotten worse.

(JE 5, p. 92) Claimant was referred to physical therapy and put on light duty restrictions. (JE 5, p. 94) On September 19, 2017 the records from DoctorsNow stated,

> PATIENT STATES SYMPTOMS ARE PERSISTENT HE HAS DIFFICULTY WALKING AND SITTING PAIN INJECTIONS HAVE NOT GIVEN RELIEF. Has known disc herniations. Has tried steroid injections without relief. States that he has kept working above his restrictions. States unable to walk straight. The only position that is slightly comfortable is laying down. Has pressure all the time. Has had incidents of difficulty with bowel function. Does have episodes of numbness/tingling.

(JE 5, p. 96) Claimant was taken off work until he saw a neurosurgeon. (JE 5, p. 98)

On September 19, 2017 claimant was taken off work until he saw a neurosurgeon. (JE 5, p. 97) Claimant saw Trevor Schmitz, M.D. at Iowa Ortho on October 9, 2017. (JE 7, p. 119) Dr. Schmitz noted, "Pain is primarily located low back

to right groin and right anterior thigh, into the anterior calf, and dorsal foot following L5 distribution." (JE 7, p. 128) Dr. Schmitz recommended a "RIGHT L4-L5 andL5-S1 posterior decompression with diskectomies." (JE 7, p. 130) Claimant was provided restrictions of no lifting above 10 pounds and to avoid repetitive bending, lifting and twisting. (JE 7, p. 132) On November 3, 2017 claimant informed Dr. Schmitz's office that his claim was being denied and he wanted to proceed using private insurance. (JE 7, p. 133) Dr. Schmitz performed surgery on November 30, 2017. (Tr. p. 88) Dr. Schmitz's postoperative diagnoses were,

1. Clinical examination consistent with right-sided leg radiculopathy as well as numbness, tingling, and weakness.
2. Right-sided subarticular stenosis, L4-5, L5-S1 secondary to disk bulging as well as facet arthropathy.

(JE 7, p. 134) Dr. Schmitz released claimant on January 29, 2018 from his care. Dr. Schmitz noted at that visit claimant still had symptoms, including pain of 3/10 on a daily basis. (JE 7, p. 141; Tr. p. 145) Dr. Schmitz provided restrictions of no heavy lifting for four to six weeks on February 7, 2018. (JE 7, p. 147) Claimant said he told Dr. Schmitz he was doing better, but never felt he was doing great. (Tr. p. 97) Claimant agreed he told Dr. Schmitz or his assistant he had improved on January 29, 2018. (Tr. p. 118) Claimant saw Dr. Schmitz on May 9, 2018 and noted that after claimant returned to work in March 2018 he began to experience right low back pain that radiated down the posterior aspect of his right leg to about mid-thigh. (JE 7, p. 148) Dr. Schmitz provided restrictions of no lifting more than 10 pounds and avoid repetitive bending, lifting, pulling and pushing. Dr. Schmitz ordered an MRI. (JE 7, p. 152) The May 16, 2018 Ancillary Service note of the MRI stated, "Low back burning pain that shoots down the right leg since surgery, pain is not as strong as prior to surgery." (JE. 7, p. 155) On June 13, 2018 Dr. Schmitz evaluated the recent MRI. Dr. Schmitz noted claimant apparently had a recurrent disk herniation on the right L5-S1. Dr. Schmitz discussed surgery with claimant. (JE 7, p. 164) On October 10, 2018 Dr. Schmitz stated, "I do think this a new disk herniation when compared to his previous lumbar spine magnetic resonance imaging." (JE 7, p. 171)

On April 18, 2018 claimant sent a text to Mr. Dykstra regarding his pain and asked whether A+ wanted to send him to a physician or whether he should go to his personal physician. Mr. Dykstra told claimant to go to his personal physician. (Ex. 5, pp. 11–15; Ex. F, p. 50)

On April 26, 2018 claimant was working on an irrigation system for a customer. While lying on the ground on his stomach, trying to connect the irrigation system claimant heard his back pop and had excruciating pain in his back and numbness in his leg. (Tr. p. 93) Claimant testified that he was laying on his belly trying not to strain his back. (Ex. F. p. 50) Claimant saw Dr. Schmitz on May 9, 2018 for his back. Claimant reported pain in his lower back radiating into the right thigh. (JE 7, p. 148; Tr. p. 141) Dr. Schmitz ordered an MRI, which was performed on May 16, 2018. (Tr. p. 94) On June 13, 2018 claimant was examined by Dr. Schmitz. At that visit Dr. Schmitz talked to claimant about the possibility of another back surgery. (Tr. p. 98) Claimant testified

he did not agree with the note of the visit that he was doing great before the April 26, 2018 incident. In response to the recommendations for surgery claimant went to the Nebraska Spine Clinic for a second opinion and saw John McClellan, M.D. Claimant arranged this examination, and it was not authorized by any defendants. (Tr. pp. 98, 99) Claimant saw Dr. McClellan on July 30, 2018. In a pain diagram claimant identified pain in his lower back and right thigh. (JE 10, p. 201; Tr. p. 142) Dr. McClellan performed back surgery in April 2019. This surgery was not authorized by defendants and was paid for with claimant's wife's health insurance. (Tr. p. 104) Claimant said that he had a fusion at two levels.

Claimant agreed that after the incident of April 26, 2018 he had new symptoms from his knee to his foot. (Tr. p. 118; Ex. F, p. 52)

Claimant testified he continued to work at A+ after the April 26, 2018 incident. Claimant was working with a 10-pound restriction as of July 30, 2018. In September 2018 A+ assigned claimant different job duties, primarily lawn mowing. His pay was reduced. (Tr. pp. 101, 102) Claimant did not do regular work after the fall of 2018 for A+. Claimant transported some workers in his wife's van for snow shoveling for A+. (Tr. p. 103) Claimant was on seasonal lay-off as of November 2018, and A+ did not have work for claimant based upon Dr. McCellan's restrictions. (Ex. 8, p. 40; Ex. D, p. 28)

Claimant started working for Hare Electric in August 2019. Hare Electric is owned by his wife's uncle. (Tr. p. 106) Claimant has no licensing or specialized training to do electrical work. (Tr. p. 106) Claimant is able to work within his restrictions. (Tr. p. 109) Claimant's restrictions by Dr. McClellan were no lifting over 45 pounds, no excessive or repetitive bending, twisting or stooping. (Tr. p. 110) Claimant in his integratory answer stated he did light work at Hare Electric. (Ex. 1, p. 2)

On May 15, 2018 claimant was examined by Dr. Rondinelli. This was the day before claimant had an MRI. Claimant agreed that the medical treatment he received between June 2016 and September 2017 was not authorized by the defendants. (Tr. p. 115) Claimant acknowledged that in October 2019 his pain was dramatically less. (Tr. p. 123) Claimant testified that the difference in his symptoms after his first surgery and his injury on April 26, 2018 was numbness that went all the way down his foot; prior to April 26, 2018 the numbness only went halfway down his leg. (Tr. 139) Claimant agreed that as of January 2020 he had pain in the right calf down to his foot. (Tr. p. 124)

Brandy Wurtzel, claimant's spouse, testified. She married claimant on July 2, 2016. (Ex. 14, p. 68) Ms. Wurtzel testified she has three children from a prior marriage and claimant has one child that lives with him. Ms. Wurtzel said there are four children in the household. Ms. Wurtzel has filed a separate tax return even when married to claimant. (Ex. 16) Ms. Wurtzel testified she and Mr. Wurtzel could file a single tax return if they wanted. (Tr. p. 29)

Ms. Wurtzel testified that when her husband was taken off work on September 19, 2017 a request was made of the insurance carriers that payments be made to claimant. (Tr. p. 30) On October 13, 2017, Mary Haselton, of Gallagher Basset informed claimant that Guard Insurance did not provide coverage to A+ in May 2016 and that Guard Insurance would not be providing workers' compensation coverage. (Ex. 6, p. 21) Claimant confirmed that a request was made via a letter on October 24, 2017. (Tr. p. 146) Ms. Wurtzel testified that claimant received four checks on three separate dates of workers' compensation benefits. (Tr. p. 31) Checks were issued on October 12, 2018, November 16, 2018 (two checks) and February 8, 2019. (Ex. B, p. 5) The parties stipulated defendants paid permanent partial disability from February 10, 2018 to February 28, 2019 (55 weeks). Defendants paid healing period benefits from September 19, 2017 through October 9, 2017 (3 weeks) November 30, 2017 through February 15, 2018 (11.43 weeks) and October 10, 2017 through November 29, 2017 (7,286 weeks). Permanent and healing period benefits were paid at the rate of $225.54. Defendants paid temporary partial disability from February 10, 2018 through February 23, 2018 in the amount of $263.14. (Hearing report File No. 5060139) No payments have been made for permanent benefits since February 8, 2018, healing period benefits since November 29, 2017 and temporary partial disability benefits since February 23, 2018. (Hearing report File No. 5060139, p. 3) I find that claimant has established a delay in payment of benefits. The delay is both a delay in timely paying benefits and not paying benefits.

Ms. Wurtzel testified that she has insurance through her employer, United Healthcare, which has paid medical expenses related to these claims. Ms. Wurtzel said United Healthcare has a subrogation interest in any medical benefits that may be awarded for claimant's medical expenses. (Tr. p. 37; Ex. 23, pp. 151- 153 Ex. 24, pp. 154, 155) Claimant has incurred medical expenses of $323,578.22 and had paid through the group health plan of Ms. Wurtzel $144,171.85 with a subrogation balance of $144,171.85. Claimant has spent $3,522.11 out of pocket and had $10,925.28 plus billing for a January 15, 2020 examination as unpaid balances. (Ex. 22, p. 116)

A+ and C & I agreed to pay certain medical expenses during the arbitration hearing. The defendants A+ and C & I, agreed to pay causally related medical bills claimant incurred from May 11, 2016 through January 29, 2018. (Tr. p. 10; Ex. L, Statement) Optum, the collector for the subrogation lien for Ms. Wurtzel's health insurance, stated that it had been paid and accepted $6,543.26 for services between May 11, 2016 through January 29, 2018. (Ex. L, p. 80)

Claimant has requested mileage of 300 miles for his trip to Nebraska Spine, 6.5 miles for his trip to Iowa Ortho, three days of stay at a motel at $89.00 and surgery stay at hotel of $380.00. (Ex. 25, p. 156)

Ms. Wurtzel testified that her husband started working for her uncle at Hare Electric in Northern Iowa in August 2019. Ms. Wurtzel's uncle owns Hare Electric. (Tr. p. 38)

Claimant was briefly seen by Danielle Coppin, D.C. at LaBounty Family Chiropractic (LaBounty) on May 11, 2016 and was referred to his family doctor. (JE 4, pp. 30–33) Claimant returned to LaBounty for treatments on May 13, 15, 17, 22, 23, 25 and 27 2016. He had treatments on June 1, 3, 9, 17, 23 and 30, 2016 . He had treatments on July 8, 15, 22 and 29, 2016. He had treatment on August 15, 2015. He had treatments on October 6, 12, 19, 26 and 31, 2016. And he had treatments on November 9, 16, 23 and 30, 2016. (JE 4, pp. 34–77) Claimant started treatment again on May 10, 24, 31, 2017. He received treatment on June 12 and 26, 2017. Claimant said as of October 23, 2017 his employer paid for five visits to the chiropractor. (Ex. 7, p. 33)

Claimant went to the emergency department on May 11, 2016 due to his back pain. X-rays showed no fracture of the thoracic spine. Claimant was provided an injection, prescriptions and referred to his family doctor. (JE 3, p.29)

On May 15, 2016 Dr. Aich examined claimant for back pain. Dr. Aich noted claimant was extremely uncomfortable laying on the floor in excruciating pain. She assessed claimant with "Midline thoracic back pain." (JE 2, p. 9) Dr. Aich saw claimant on January 10, 2017 for evaluation of low back problems. Dr. Aich noted claimant reported back pain that starts in the back on the right side, radiates down to the groin and into the leg. Dr. Aich prescribed gabapentin. (JE 2, p. 13) On May 18, 2017 Dr. Aich diagnosed claimant with, "Chronic right-sided low back pain with right-sided sciatica." (JE 2, p. 20) Dr. Aich ordered an MRI, which was performed June 8, 2017. The impression from the MRI was,

1. Generalized degenerative disc disease which appears somewhat advanced for the patient's age.
2. Broad-based left-sided disc protrusion at the L3-4 level. This produces mild mass effect on the left L3 nerve root just outside the left neuroforamen.
3. Small midline disc herniation at the L4-5 level. This produces mild mass effect on the right L5 nerve root within the entry zone to the right lateral recess.
4. Small extruded right-sided disc herniation at the L5-S1 level. This does not appear to produce significant mass effect on the thecal sac or neural elements.

(JE 2, p. 19)

Robert Rondinelli, M.D. examined claimant on May 15, 2018 and issued a report on May 21, 2018[1]. (JE 8, pp. 178–191) Concerning the May 16, 2016 injury, Dr. Rondinelli found:

> Within medical probability, Mr. Wurtzel has the following conditions pursuant to this claim:

[1] Dr. Rondinelli did not have the opportunity to review the latest MRI when he took his history.

1. Degenerative spondylosis lumbosacral spine with symptomatic mechanical low back pain.
2. Strain-type injury to mid thoracic and lumbar spine since May 11, 2016, with symptoms including middle and low back pain, right radicular complaints affecting his buttock and posterior thigh, and an abnormal MRI dated June 8, 2017, which shows advanced degenerative disc disease for his age, and presence of a left L3-4 disc protrusion with mild mass effect on the left L5 nerve root, a small midline disc herniation at the L4-5 with mild mass effect on the right L5 nerve root in the vicinity of the lateral recess, and a small extruded right side herniated disc at L5-S1 level with no significant mass effect. In addition, he is status post posterior lumbar decompression and discectomy at L4-5 and L5-S1 level since November 30, 2017.
3. Delayed recovery syndrome associated with the above conditions with possible psychosocial contributors including depression and anxiety.
4. History of previous left ankle sprain since 2014, resolved.

(JE 8, p. 181) In responding to a question as to whether the diagnoses were related to the May 16, 2016 injury Dr. Rondinelli stated,

> Of the above diagnoses, and within medical probability, his Strain-type injury to the mid thoracic and lumbar spine and resulting middle and low back pain condition was materially caused by the injury dated 05/11/2016. This injury also comprises his right lumbar paravertebral and lower extremity radicular complaints, and is substantiated by an abnormal MRI dated June 8, 2017, with evidence of a small extruded right-sided disc at the L5-S1 level, and a small midline disc at L4-5 level with mass effect on the right L5 nerve root. This injury is also materially associated with and aggravating to his underlying mechanical back pain due to multilevel degenerative spondylosis.

(JE 8, p. 181) Dr. Rondinelli recommended a work hardening program and provided an 11 percent whole body impairment rating. (JE 8, pp. 182, 183)

On August 16, 2019 David Boarini, M.D. provided an independent medical examination (IME). Dr. Boarini noted the causation was entirely a matter of history. (JE 11, p. 278) Dr. Boarini noted claimant had an injury in 2016, had surgery and, “He then, had apparent recurrent lumbar radiculopathy with a very minor incident in April 2018.” (JE 11, p. 278) Dr. Boarini opined that the treatment, including the two surgeries were reasonable medical care. (JE 11, p. 278) He did not believe the claimant was at MMI, but expected a permanent impairment between 12 to 15 percent. He did not think he would need specific restriction once claimant ‘s fusion was fully healed, but might have limitations if his foot drop did not improve. (JE 11, p. 279) Dr. Boarini wrote,

> As noted above, causation in this case is entirely historical in nature but if the patient’s relation of history is correct, I would date this to the work

> injury in 2016 and the recurrent disk should be considered an ongoing part of the same problem.

(JE 11, p. 279) I find that the history provided to Dr. Boarini was accurate.

On July 30, 2018 claimant was seen by Dr. McClellan concerning his May 11, 2016 injury. (JE 10, p. 201) Dr. McClellan's impression was:

> Pain in right leg
>
> Right L5 radiculopathy and Right S1 radiculopathy present with numbness and motor deficit Grade 4/5
>
> Widespread DDD lumbar spine
>
> Retrolisthesis with vacuum changes L5/S1
>
> Possible SBO S1. Not visualized on MRI but plain films suggests SBO of S1.
>
> Recurrent right L5-S1 disc herniation
>
> Modic changes and foraminal stenosis moderate L4/5 and L5/S1.
>
> Prior lumbar decompression Right L4/5 and L5/S1 November 30 2017. After original surgery returned to work for a month or two before recurrent symptoms and recurrent herniation.

(JE 10, p. 209) Dr. McClellan wrote claimant should consider an L4-S1 fusion and decompression. (JE 10, p. 209) On January 16, 2019 Dr. McClellan wrote, "Cory underwent CT and EMG testing. The imaging demonstrates chronic nerve injury moderate in severity, right L5 and S1. Unfortunately, they are also active ongoing potentially suggesting further injury is occurring." (JE 10, p. 212)

At one time in January 2019 claimant was considering obtaining a CDL. (JE 10, p. 214) Claimant informed Dr. McClellan that he was considering looking for work that did not involve as much physical labor. (JE 10, p. 223)

On April 11, 2019 Dr. McClellan performed surgery. The postsurgical diagnosis was,

1. Failed laminectomy syndrome.
2. Retrolisthesis L4-5, L5-S1.
3. Severe lateral recess subarticular stenosis.
4. Severe foraminal stenosis.

(JE 10, p. 227) As of May 13, 2019 claimant was off work. (JE 10, p. 238) On July 22, 2019 claimant was permitted to work four hours per day at light duty. (JE 10, p. 249)

On September 6, 2019 claimant was allowed to work 40 hours at light level. (JE 10, p. 258)

On October 16, 2019 Dr. McClellan noted claimant was not working. (JE 10, p. 260) Dr. McClellan provided claimant with a return to work with no lifting over 45 pounds, no excessive or repetitive bending, twisting or stooping and that claimant has the ability to change positions for comfort. (JE 10, p. 262) On January 15, 2020 Dr. McClellan noted claimant had dramatically less pain and improved sciatica. Claimant was experiencing constant tingling and clumsiness in the right foot and leg. Claimant was at MMI at the time of this visit. (JE 10, p. 270) Dr. McClellan wrote,

> At this point, after speaking with Cory, he has learned to live with the residual symptoms. The medium demand duty is a reasonable permanent restriction for the injuries sustained at work.
>
> At this point, I explained to Cory that it is my opinion that he is at maximum medical improvement as a result from the injuries sustained 05/11/2016 and 04/26/2018. Those injuries were a substantial factor causing/aggravating the symptomatic stenosis in the lumbar spine which required the surgery performed 04/11/2019.
>
> It is my opinion that the work injuries and the surgery provided will require permanent restrictions, limiting Cory to medium demand duty.

(JE 10, p. 272)

Defendants requested Daniel Miller, M.D. provide care. Dr. Miller saw claimant on August 23, 2018. He noted claimant had been switched to the mowing crew at work. As claimant was to consult with Dr. Schmitz, Dr. Miller would wait for additional information. (JE 9, p. 198) On October 15, 2018, Dr. Miller wrote defendants, "As two spine surgeons have recommended consideration of further spinal surgery, I believe the recommendations of Dr. McClellan are reasonable and necessary." (JE 9, p. 200)

On December 9, 2019 Sunil Bansal, M.D. performed an IME. Dr. Bansal opined that the May 11, 2016 work injury aggravated claimant's lumbar spondylosis at L4-L5 and L5-S1 that required the November 30, 2017 surgery. (Ex. 20, p. 112) Regarding the April 26, 2018 injury Dr. Bansal wrote,

> In my medical opinion, Mr. Wurtzel's worsening symptoms during the period of March/April 2018 were from a continuation of his previous May 11, 2016 injury. Essentially, he had a recurrence of the same right-sided pathology at L5-S1, manifesting as similar symptomatology prior to his November 30, 2017 surgery. The surgery performed that day would best be classified as resulting in a failed laminectomy syndrome, necessitating the more interventional option performed by Dr. McClellan, a two-level fusion.
>
> And further stated:

> Mr. Wurtzel returned to his job that entailed lifting, bending, and twisting. It is my medical opinion that the return to these physically demanding duties served as a catalyst in the aggravation of his spinal condition that continued since the May 11, 2016 injury. The combination led to a failed laminectomy syndrome, necessitating the surgery by Dr. McClellan.

(Ex. 20, pp. 112, 113) Dr. Bansal provided a 22 percent whole body impairment rating. (Ex. 20, p. 113) Dr. Bansal recommended, due to the propensity of adjacent segment disease, a 35-pound lifting restriction and no frequent bending, twisting or stooping and that claimant have the ability to change positions from sitting to standing as needed. (Ex. 20, p. 114) Dr. Bansal charged claimant $588.00 for the medical examination and $2,988.00 for the report for a total of $3,576.00. (Ex. 21, p. 115)

Claimant filed two petitions for alternate medical care: One in October 2018 and one in February 2019. (Ex. 18, pp. 82, 85) In both petitions, all the defendants denied liability and the petitions were dismissed. (Ex. 18, pp. 80, 81, 83, 84) (See also Ex. B, p. 16)

Defendants A+ and C & I paid the 11 percent body as a whole rating by. Dr. Rondinelli, 55 weeks, from February 10, 2018 through February 28, 2019. (Ex. 8, p. 39; Ex. B, p. 49) Defendants A+ and C & I on July 26, 2018 informed claimant that it would pay claimant for lost time between May 11, 2016 and his release to return to work after his surgery by Dr. Schmitz. Defendants A+ and C & I stated that Dr. Schmitz considered claimant had a new injury after he released him from his care. (Ex, 9, p. 41)

Defendants A+ and C & I calculated claimant's average weekly wage by the following,

Week #	Week Ending Date	Hourly Pay Rate	Total # Hours Worked-Ovt & Reg	Gross Wage
1	4/29/2016	$10.18	55	$640.00
2	4/22/2016	$14.27	39.25	$640.00
3	4/15/2016	$9.29	60.25	$640.00
4	4/8/2016	$11.55	48.5	$560.00
5	3/31/2016	$8.64	62.5	$540.00
6	3/11/2016	$7.50	5.25	$39.38
7	2/19/2016	$7.50	7.75	$58.13
8	2/12/2016	$7.50	10.5	$78.75
9	2/5/2016	$7.50	6	$45.00
10	1/29/2016	$7.50	5.5	$41.25
11	1/22/2016	$7.50	6	$45.00
12	1/8/2016	$7.50	24	$180.00
13	11/25/2015	$9.31	58	$540.00
			TOTAL	$4,047.49

AWW	$311.35
Exemptions	M-3
Rate:	$225.54

(Ex. B, p. 20; Ex. 17, p. 79; Ex. G, p. 68) A+ and C & I and claimant stipulated in the Hearing Report that claimant was single and entitled to two exemptions. (File No. 5060139 Hearing Report p. 2)

As for the claimant's workers' compensation rate for File No. 5066566, April 26, 2018 date of injury, defendants Amguard provided the following calculation.

Cory Wurtzel		4/26/2018 doi			
2/16/2018	$132.00				
2/23/2018	$96.00				
3/2/2018	$192.00				
3/23/2018	$682.56		3/23/2018	$682.56	
3/30/2018	$675.50		3/30/2018	$675.50	
4/6/2018	$655.38		4/6/2018	$655.38	
4/13/2018	$702.72		4/13/2018	$702.72	
4/20/2018	$702.72		4/20/2018	$702.72	
	$3,838.88			$3,418.88	
	$479.86			$683.78	
	$329.59	M/2		$454.17	M/2

(Ex. AA, p. 1)

Claimant has requested costs as follows,

Claimant's Costs

Date	Description	Amount
11/22/2017	CIOX Health	$41.37
2/20/2018	Data File Tech	$24.00
4/19/2018	DWC – Filing Fee	$100.00
6/6/2018	Data File Tech	$59.50
10/29/2018	DWC – Filing Fee	$100.00
12/11/2018	Sweeney Reporting – Depo	$252.50
9/20/2019	Dr. McClellan Med. Rec.	$49.00
	TOTAL	$626.37

CLAIMANT'S IME

1/13/2020	Dr. Bansal IME – unpaid	$3,576.00

(Ex. 26, p. 159)

At the time of the hearing claimant was working for his wife's uncle at Hare Electric. He is a helper and he has no certification or license to perform electrical work.

Claimant is able to work within his restrictions. Claimant has a 10th grade education. While the fusion performed by Dr. McClellan was beneficial in relieving most of his low back pain claimant has residual pain and numbness in his right leg. He is subject to adjacent segment disease next to his fusion. Claimant cannot return to work for A+ and a number of his prior jobs. I find claimant has a 35 percent loss of earning capacity.

ANALYSIS AND CONCLUSIONS OF LAW

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).

Claimant has filed three petitions alleging three different injury dates. The first injury date is May11, 2016, File No. 5060139. C & I admit that there was an injury due

to claimant's fall. C & I asserts that after claimant's surgery and return to work the claimant suffered a new injury after he was at MMI from his May 11, 2016 injury.

Amguard denies that claimant had a new injury on September 7, 2017, File No. 5060140. Amguard denies claimant had a new injury on April 26, 2018, File No. 5066566.

In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. The injury dates in File No. 5060139 and File No. 5066566 are after July 2017 when the changes were in effect. The claim in File No. 5060139 is analyzed under the law in effect at the time of his injury: The law before the 2017 changes.

File No. 5060140 (September 7, 2017, date of injury)

The claimant alleged an injury date of September 7, 2017 for File No. 5060140. Claimant stated he reported this injury date as he was told to file injury reports whenever he felt new or more pain. Claimant testified that he filed a number of other reports of injury. None of the physicians who examined claimant have opined that the incident on September 7, 2017 was a new injury. Claimant and his wife did not testify that this was a new injury, but a continuation of his symptoms. The evidence is marginal, at best, claimant had any new injury September 7, 2017. The claimant has not met his burden of proof for this file and shall take nothing in File No. 5060140.

File No. 5060139 (May 11, 2016, date of injury) and File No. 5066566 (April 26, 2018, date of injury)

The closer question in these cases is whether claimant had a second injury on April 26, 2018. For the reasons set forth below, I find that the claimant did not have a second injury on April 26, 2018. I find that claimant's injury and disability is causally related to his May 11, 2016 injury.

On May 11, 2016 claimant injured his back while working on the job for A+. Claimant had surgery performed by Dr. Schmitz on November 30, 2017. Claimant returned to work with restrictions for four to six weeks in February 2018 and then to full duty.

Shortly after claimant returned to work with no restriction, claimant was laying on his stomach trying to minimize the stress on his back when he had the incident on April 26, 2018. That incident lead to the spinal fusion surgery performed by Dr. McClellan.

Dr. Schmitz reviewed MRIs after the April 26, 2018 incident and concluded that claimant had a new work injury. This is the opinion C & I has relied upon to deny additional benefits to claimant.

On July 30, 2018 Dr. McClellan noted a recurrent right L5-S1 disc herniation. Dr. McClellan's postsurgical note of April 11, 2019 lists failed laminectomy syndrome. (JE 10, p. 227) On October 16, 2019 his impression was "1. 6-month status post L4-S1

fusion. 2. Revision surgery for failed lumbar decompression procedure." (JE. 10, p. 261) While Dr. McClellan stated claimant was at maximum medical improvement from the injuries of May 11, 2016 and April 26, 2018, he does not provide any analysis as to whether the April 26, 2018 incident was caused by the May 11, 2016 incident.

Dr. Boarini provided an IME and opinions as to causation. Dr. Boarini on August 16, 2019 found, based upon the history he received, that the claimant's injury in May 2016 has caused his disability. Dr. Boarini stated the incident in April was a minor incident. Dr. Boarini stated in conclusion that if the claimant's history was accurate, claimant's work injury of May 2016 and recurrent disk should be considered an ongoing part of the same problem. (JE 11, p. 279)

I found claimant provided an accurate history to Dr. Boarini. It is consistent with the history he provided Dr. Rondinelli, Dr. Bansal and Dr. McClellan in major aspects.

Dr. Bansal's opinion was that claimant's worsening symptoms were due to a continuation of the May 2016 injury. Dr. Bansal noted that claimant's work and the failed laminectomy surgery led to his surgery by Dr. McClellan.

The preponderance of the evidence is that claimant's May 11, 2016 injury is the cause of his current symptoms and his fusion surgery.

For File No. 5066566 (Date of injury, April 26, 2018)

I find that claimant did not suffer a new injury on this date, but a reoccurrence of his May 11, 2016 injury. Claimant shall take nothing from this file.

File No. 5060139 (May 11, 2016, date of injury)

As outlined above, I found claimant has proven by a preponderance of the evidence that his current symptoms, disability and medical treatment was causally related to his May 11, 2016 injury. Claimant's injury is an industrial disability.

Extent of disability

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 terms of percentages of the total physical and mental ability of a normal man."

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

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant had a two-level fusion and has had a good reduction in his back pain. Claimant has numbness in his right leg related to his work injury. Claimant is limited to medium work and should limit frequent bending, twisting or stooping. Claimant is able to work within his restriction in his current employment.

Claimant was very motivated to stay working for A+ and did so in a great deal of pain. He has been motivated to work. Claimant's education is not a positive factor, especially in working in supervision. Much of his industrial base has been reduced due to his restrictions. Considering all the factors of Industrial disability, I find that claimant has a 35 percent industrial disability.

Healing period and commencement date

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).

Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

Crabtree v. Tri-City Electric Co., File No. 5059572, pages 3, 4 (App. March 20, 2020) the commissioner held:

> In Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016), however, the claimant returned to work the day after his injury, yet the

> Iowa Supreme Court chose a later commencement date. More specifically, the Iowa Supreme Court identified claimant's return to work after his initial healing period as the commencement date.
>
> The claimant in Evenson went back to work the day after his injury and continued working until either September 3 or 7, 2010. Id. at 362-63. He was then off work until September 20, 2010. Id. at 372. The court held:
>
> The commissioner found Evenson returned to work on September 20, 2010, after several days off. This ended the first healing period as a matter of law because it was the earliest of the section 85.34(1) alternatives and because PPD "shall begin at the termination of the healing period provided in subsection 1 [of section 85.34]." Iowa Code § 85.34(1)–(2). Because we conclude the first healing period ended on September 20, there is not substantial evidence in the record to support the commissioner's finding the healing period benefits terminated in November 2011. *See Teel,* 394 N.W.2d at 406–07 (concluding a claimant's entitlement to PPD benefits commenced when the claimant first returned to work after his 1974 injury - not after subsequent intermittent healing periods or after he finally "returned to work for good" in 1981 after a series of surgeries). The date of Evenson's first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1). Iowa Code § 85.34(1).

Id. (emphasis added).

In this case, claimant was off work September 19, 2017. The release to return to work by Dr. Schmitz was dated February 7, 2018. (JE 7, p. 147) I find that claimant is entitled to healing period benefits from September 19, 2017 through February 7, 2018.

Claimant is entitled to a second period of healing period benefits for the date of his fusion surgery, April 11, 2019 until he was returned to work on October 16, 2019 with permanent restrictions of a 45-pound lifting restriction.

Permanent partial disability benefits commence on February 8, 2018.

Medical expenses

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).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App. February 27, 1995).

Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.")

Claimant has the burden to show the costs were reasonable.

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment. I find the care claimant received to be reasonable and the costs to be reasonable.

I find the claimant has proven the medical costs in Exhibit 22, page 116 are related to his May 11, 2016 injury, the care he received was reasonable and the fees charged are reasonable. Defendants shall pay the medical expenses shown in Exhibit 22. Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance have paid the medical bills from May 11, 2016 through January 28, 2018. (Ex. L) As those payments have been paid the defendants do not need to pay claimant directly for these expenses and shall receive credit for these payments.

I also find the medical mileage and lodging expenses in Exhibit 25 to be reasonable and causally related to the May 11, 2016 injury. Defendants shall pay these costs.

IME costs

Iowa Code section 85.39, permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Iowa Code section 85.39(2) (2016). The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination. Id.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Iowa Code section 85.39(2) (2016). 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). Claimant need not ultimately prove 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).

In this case Dr. Bansal performed his IME in December 2019. The defendants had obtained ratings of claimant's impairment by a physician of their choosing before this date. Dr. Bansal has billed claimant $3,576.00 for the IME examination and report. I find this to be reasonable and defendants shall pay this cost.

Rate

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately

preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6) provides:

> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.
>
> "[T]he determination of whether wages are customary under the circumstances is a matter expressly committed by section 85.36(6) to the discretion of the commissioner." *Jacobson,* 778 N.W.2d at 199.

Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 872 (Iowa Ct. App. 2011).

> With respect to the workers' compensation statute in particular, we keep in mind that the primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee. Stone Container Corp*.,* 657 N.W.2d at 489; Harker*,* 633 N.W.2d at 325.
>
> With these principles to guide our analysis, we turn to the relevant statutory provisions. The basis for an injured employee's compensation under the workers' compensation act is "the weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. Section 85.36 defines "weekly earnings" as [the] gross salary, wages, or earnings of an employee to which such an employee would have been entitled *had the employee worked the customary hours* for the full pay period in which the employee was injured, as *regularly required* by the employee's employer for the work or employment for which the employee was employed....
>
> Id*.* (emphasis added). For employees such as Guarino, who are paid on an hourly basis, "weekly earnings" are computed "by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury." Id. § 85.36(6).

> The question that arose in this case is how this computation is affected when one or more of the weeks in the thirteen-week period do not reflect the "customary hours ... regularly required by the employee's employer." Id. § 85.36.

Griffin Pipe Prod. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003).

Defendants C & 1 wage calculation is not correct. According to Exhibit 17, page 79 and Exhibit G, page 69, defendants did not acknowledge claimant was paid salary and applied a fluctuating straight-time calculation. Defendants used weeks when claimant was on winter lay-off and was on-call and performed some sporadic snow removal. Defendants' calculations do not reflect claimant's customary hours or his customary wages.

The claimant was paid a production commission, however, there is not enough evidence in the record to determine whether this was a regular or irregular bonus. There is not enough evidence to determine if it should be included in claimant's customary wage. The production commission is not included in my calculation of claimant's gross weekly wage. The chart below includes the customary wages claimant received at A+ just before his May 11, 2016 injury and not including the irregular money he received during his winter lay-off.

Date	Salary	Wages	Total	Exhibit page
4/29/2016	$560.00	$87.30	$727.30	Ex. 13 pp 54, 55
4/22/2016	$560.00			Ex. 13, p. 54
4/15/2016	$560.00	$107.73	$747.73	Ex. 13 p. 54
4/8/2016	$560.00	$49.13	$606.13	Ex. 13 p. 53
3/31/2016	$540.00	$97.20	$630.20	Ex. 13 p. 53
5 weeks		**Total**	$2,711.36	

		÷ 5 weeks	$542.27	
		Single 2 exemptions		
		Weekly rate	**$352.62**	

Costs

Claimant has requested $626.37 in costs. (Ex. 26, p. 159) Iowa Code section 86.40 states in part:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. ...

I find that the $100.00 filing fee and the deposition costs of $252.50 are allowable costs under the rules. In my discretion I award claimant these costs in the amount of $352.50. The copy fees charged to claimant by medical providers do not come under the definition of allowable costs under 876 IAC 4.33 and are not granted.

Penalty

Claimant has requested penalty for:

Underpayment due to understatement of claimant's average weekly rate;

Failure to pay benefits after February 28, 2019;

Failure to fairly evaluate and pay claimant's industrial disability;

Failure to utilize Iowa Code section 85.21 promptly to assure payment of benefits between insurance carriers.

Claimant asserts that defendants unreasonably denied or delayed payment of weekly benefits in this case and urges assessment of penalty benefits against defendants as well.

Iowa Code section 86.13(4) provides:

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 percent 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 in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable

cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case an order pursuant to Iowa Code 85.21 was issued on July 18, 2019. The order was requested by C & I. There was no dispute that claimant had a work related incident on April 26, 2018. That incident led to the two-level spinal fusion performed by Dr. McClellan. After this incident claimant's job was changed from irrigation to mowing, with a reduction in pay, and claimant was terminated by his employer due to his limitations. The employer has a duty to pay workers' compensation benefits, for work-related injuries, regardless of who the insurance carrier is. With the 85.21 order there was no reason that the employer should not have paid benefits, both temporary and additional permanency after the April 26, 2018 incident. While there was a dispute between insurance carriers, the employer remained responsible to pay benefits. The employer did not do so, which has exposed the employer to penalty. In this case, claimant had surgery on April 11, 2019 and was returned to work with a 45-pound restriction on October 16, 2019. The last payment of permanent benefits was on February 8, 2019. Claimant was paid Dr. Rondinelli's 11 percent impairment rating. Claimant has established a delay or denial of weekly benefits.

There is no evidence that the defendants revaluated the extent of claimant's impairment after the April 26, 2018 incident. Dr. Rondinelli's opinion concerns the May 2016 injury. The claimant had a limited education.[2] He was terminated from his work at A+. He had a two-level fusion and was restricted to 45-pounds of lifting. There is no justification in the record for just paying the rating that Dr. Rondinelli gave for the May 2016 injury. Dr. Bansal provided a 22 percent impairment rating. The minimum defendants should have reasonably paid claimant was for a 20 percent impairment.

[2] Claimant incorrectly led A+ to believe he had his GED.

Defendants paid 11 percent. I award penalty for failure to conduct a reasonable investigation and pay claimant at least a 20 percent industrial disability. Defendants underpaid claimant 9 percent.

In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d at 238 (Iowa 1996). Considering all of the appropriate factors in assessing the amount I award a penalty in the amount of $$7,933.95 to deter such conduct in the future

The underpayment is nine percent or 45 weeks. Given the length of delay and unreasonable conduct I order defendants to pay a penalty of 50 percent. Defendants shall pay claimant the equivalent of 22 weeks of benefits [500 x 9% = 45: 45 x 50% = 22.5 weeks] [$352.62 x 22.5 = $7,933.95]. Defendants shall pay claimant $7,933.95 in penalty benefits. I find that this amount of penalty is sufficient for the delay in timely payment as well as the failure to reasonably pay benefits.

ORDER

File No. 5060140 (September 7, 2017, date of injury)

The claimant shall take nothing on this file.

For File No. 5066566 (Date of injury, April 26, 2018)

The claimant shall take nothing on this file.

File No. 5060139 (May 11, 2016, date of injury)

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant healing period benefits from September 19, 2017 through February 7, 2018 and from April 11, 2019 through October 16, 2019 at the weekly rate of three hundred fifty-two and 62/100 dollars ($352.62).

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability commencing on February 8, 2018 at the weekly rate of three hundred fifty-two and 62/100 dollars ($352.62).

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant penalty benefits of seven thousand nine hundred thirty-three and 95/100 dollars ($7,933.95).

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay the medical expenses as set forth in this decision. Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant directly any out-

of-pocket expenses reimbursed by the health insurance claimant had through his wife's policy. The defendants shall receive credit for medical expenses previously paid.

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay the medical mileage and lodging costs from Exhibit 26.

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant the cost of the IME in the amount of three thousand five hundred seventy-six dollars ($3,576.00).

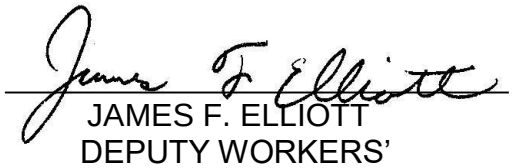
Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall pay claimant costs of three hundred fifty-two and 50/100 dollars ($352.50).

Defendants A+ Lawn & Landscaping and Commerce and Industry Insurance shall receive credit for benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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).

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

Signed and filed this 30th day of April, 2020.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Kathryn Johnson (via WCES)
Jean Dickson (via WCES)
Eric Lanham (via WCES)
Dennis McElwain (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.