BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN L. KOOL, Claimant, vs. BROUILLETTE BODY SHOP, Employer, and AMERICAN FAMILY INSURANCE GROUP, Insurance Carrier, Defendants.	FILED JUN 27 2017 WORKERS' COMPENSATION File No. 5044327 ARBITRATION DECISION Head Note Nos.: 1402.40, 1801, 2500

STATEMENT OF THE CASE

Brian Kool, claimant, filed a petition in arbitration seeking workers' compensation benefits from the employer, Brouillette Body Shop and the insurance carrier, American Family Insurance Group. The arbitration hearing was held on September 28, 2016. The parties filed post-hearing briefs on November 16, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes: Joint Medical Exhibits 1 through 19; Claimant's Medical Expenses Exhibits 101 through 107; Claimant's Non-Medical Exhibits 201 through 207; and, Defendants' Exhibits A through F. All of the exhibits were admitted without objection. Claimant, Brian Kool, testified at the hearing.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits for the period from December 21, 2012 through September 15, 2014.

2. Extent of permanent partial disability benefits, if any.

3. A determination of the appropriate commencement date for permanent partial disability benefits.

4. Whether claimant is entitlement to payment of medical expenses contained in Exhibits 101-107.

5. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 47 years old at the time of the hearing. (Transcript page 12) He graduated from High School in 1987 in Sioux Falls, South Dakota. (Tr. p. 13)

While claimant was still in high school he began working part-time in an auto body repair shop. (Tr. p. 14) After graduating from high school, he began working full-time in auto body repair. (Id.) Claimant has spent all of his working life in auto body repair, except for one year in a sales position from 1995 to 1996. (Tr. pp. 14-15; Exhibit 202, unnumbered pp. 3 & 4) Claimant began working for the defendant employer, Brouillette Body Shop in 1996 and worked there until December 21, 2012, when the owner retired and closed the shop. (Ex. 202, unnumbered p. 3) Claimant's work at Brouillette required "a lot of bending, twisting, [and] kneeling." (Tr. p. 15) He used hand tools, air tools and had to climb up, on and around the vehicles that he was repairing. (Id.) The owner, Scott Brouillette, stated in his deposition that the job was "very physical," and that claimant was an "[e]xcellent" employee. (Ex. 205, pp. 6, 9)

After the stipulated work injury of September 15, 2011, claimant continued to work at Brouillette Body Shop until it closed on December 21, 2012. (Tr. p. 29) He agreed that after the injury, his back condition was "taken into consideration," concerning the type of work he was assigned to do. (Id.) Claimant continued to work "on somewhat of a – of a light-duty status." (Id.) Mr. Brouillette stated in his deposition that claimant had trouble after the injury with "the heavy stuff" and "the low bend-over lifting," and would get help completing some job tasks. (Ex. 205, p. 8)

After Brouillette Body Shop closed, claimant looked for work at other auto body repair shops and would tell them about his back injury and that he had back problems. He had difficulty finding work. After almost two years, claimant started working for Bort Auto Body in South Sioux City, Nebraska, around September 15, 2014. (Tr. p. 40) Claimant testified that he advised the owner of Bort Auto Body about his "back problem," when he was hired. (Tr. p. 41) He continued to work for Bort Auto Body at the time of the hearing. (Tr. p. 42)

The parties stipulated in the hearing report that claimant sustained an injury that arose out of and in the course of his employment on September 15, 2011. (Hearing Report, p. 1) On that date, while working for Brouillette Body Shop, claimant was on an elevated stand, putting a metal roof skin on a Suburban when his right knee gave out and he fell off the stand and landed on the concrete floor, about three and one half feet to four feet below, landing on his back. (Tr. pp. 23-24: Ex. 1, p. 1; Ex. C, p. 8) The incident happened at the end of his claimant's work shift. (Ex. C, p. 9) He did not seek immediate medical treatment, hoping that it would feel better in a few days. (Id.) He alerted the shop owner, Scott Brouillette, the following morning that he had been injured. (Tr. p. 27; Ex. 205)

Claimant did not miss any time from work due to the injury from the date of the injury through the date the body shop closed on December 21, 2012. (Ex. C, p. 10)

Claimant had not had any injuries to his right knee or low back before the September 15, 2011 work injury. (Ex. C, p. 7)

On September 20, 2011, claimant sought treatment with Jamison Wagner, D.C., a chiropractor that claimant was familiar with. (Tr. pp. 24-25; Ex. 1, p. 1) The employer was aware of the injury and aware that he was going to Wagner Chiropractic. (Tr. p. 27) Claimant was familiar with Dr. Wagner because he had seen him in the past for his left shoulder. (Ex. C, p. 9) After evaluating claimant, Dr. Wagner suspected a low back strain. (Ex. 1, p. 1)

On October 4, 2011, claimant was referred by Dr. Wagner to Michael Espiritu, M.D., an orthopedic surgeon, at CNOS. (Tr. pp. 28-29; Ex. C, p. 9) Claimant reported to Dr. Espiritu that he had lower back pain and improved neck pain. Claimant advised that he did not have neck or back symptoms prior to the fall. (Ex. 2, p. 1) The plan was to get a CT scan of his lumbar spine and he was assigned work restrictions of limiting his lifting to 10 pounds frequently and 11-19 pounds occasionally. (Ex. 2, p. 2)

On October 18, 2011, Dr. Espiritu recorded that claimant fell out of a tree stand and landed on his back. (Ex. 2, p. 7) Claimant adamantly denied that he fell out of a tree stand. He states that this comment is simply wrong. He was standing on a platform at work when he fell, as described above. (Tr. pp. 92-93) The CT scan revealed no fracture or subluxation. (Ex. 2, p. 7; Ex. 3, p. 1) Dr. Espiritu did not believe that claimant had reached maximum medical improvement at that point and ordered therapy and gave him a muscle relaxer. (Ex. 9, pp. 22-23)

On October 19, 2011, claimant was seen at Community Rehab for physical therapy, ordered by Dr. Espiritu. At that time, claimant noted significant pain in his low back since the fall, which he described as limiting his ability to work and perform daily activities. (Ex. 4, p. 1) On December 2, 2011, the therapist noted that Brian reported that the pain was still the same. (Ex. 4, p. 11) On December 27, 2011, he was discharged per the doctor's request and was instructed to continue with home exercises. (Ex. 4, p. 15)

On November 1, 2011, at the request of Karen McBride, RN, the nurse case manager, claimant was seen by Douglas Martin, M.D. (Ex. 5, p. 1) Dr. Martin assessed claimant with "[m]echanical low back pain after a fall injury." (Ex. 5, p. 2) Dr. Martin advised that claimant was to continue with physical therapy three times per week, and use heat and ice applications. (Id.) Claimant was placed on restrictions of lifting, carrying, pushing and pulling in the 25 to 49 pound range. He was to limit bending, twisting and squatting to occasional. He was encouraged to be aware of "positional type issues," and "to resume as much normal activity as possible." (Ex. 5, p. 3)

On November 21, 2011, Dr. Martin continued claimant on physical therapy, changed his medications and changed his lifting restriction to the 35 to 49 pound range. (Ex. 3, p. 5) Claimant continued to treat with Dr. Martin with little to no improvement. Dr. Martin stated on December 19, 2011, that the medication and physical therapy had "reached maximum therapeutic benefit." (Ex. 5, p. 8)

On December 29, 2011, claimant had bilateral lower lumbar facet injections at L3-4 and L4-5 with Dr. Adajar, which did not change his back pain. (Ex. 6, pp. 3-4; Ex. 5, p. 9) Dr. Martin stated on January 16, 2012, "I know of no additional medical treatment that would be recommended," and declared claimant to be at MMI. Dr. Martin recommended a functional capacity evaluation (FCE). (Id.)

On January 17, 2012, claimant underwent an FCE at Human Performance Testing with Terry Nelson, PT. The therapist concluded that the testing was invalid stating that claimant's "actual Physical Demand Level must be left to conjecture and the results of [this] Functional Capacity Evaluation should not be used to determine this patient's permanent restrictions." (Ex. 7, p. 7)

On January 30, 2012, claimant was seen again by Dr. Martin who confirmed that claimant is not a surgical candidate and following the invalid FCE, Dr. Martin released him to return to his normal activities, noting that "it is in his best interest to be 'normal,'" and assigned no permanent work restrictions. (Ex. 5, p. 13) Dr. Martin, considered an impairment rating under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, and placed claimant in the DRE Category I for his lumbar spine and assigned a zero percent impairment. (Id.) Dr. Martin also noted that claimant described right knee pain that claimant attributed to the work injury. Dr. Martin stated that this was a new injury, not previously referred to in the records. He described the injury as an MCL strain and stated "I do not feel anything additional needs to occur with that, from the standpoint of diagnostics or treatment." (Ex. 5, pp. 11-12)

Claimant's complaints of pain continued and in June 2012, claimant is referred to Leonel Herrera, M.D., by the workers' compensation insurance carrier. (Ex. 8, p. 3) Dr. Herrera ordered a lumbar MRI, which revealed degenerative changes with "components of spinal canal stenosis," which is "most marked at L3-4 with moderate to severe stenosis," and "L4-5 left postlateral chronic osteophyte/disc changes and bulging annulus obliterate the lower recess of left neuroforamen, compresses left L4 nerve root, faintly within the neuroforamen but mostly after it exits the neuroforamen." (Ex. 8, p. 2)

On July 16, 2012, claimant was seen by Dr. Herrera and reported that his back pain was 8/10 and denied any leg pain. (Ex. 8, p. 3) The pain diagram prepared by claimant showed only pain in the low back area and nothing in his right knee or leg. (Ex. 8, p. 11) At that time, claimant reported about a 20 percent improvement in his back pain since the injury. (Ex. 8, p. 3) He was diagnosed with "[c]hronic mechanical low back pain/chronic sacroiliac ligamentous sprain secondary to fall at work." (Ex. 8, p. 5) Dr. Herrera recommended bilateral sacroiliac joint injections and a rehabilitation program. (Id.) On August 16, 2012, Todd Stevens, D.O., administered the bilateral SI injections. (Ex. 9, p. 1)

On August 30, 2012, claimant reported no improvement from the bilateral SI joint injections. (Ex. 8, p. 13) Dr. Herrera recommended that claimant start a monitored rehabilitation program and receive an epidural steroid injection. (Id.) An epidural flood was administered on September 12, 2012. (Ex. 10, p. 1)

On September 18, 2012, claimant commenced a physical therapy program. (Ex. 11, p. 1)

On September 27, 2012, Dr. Herrera reviewed the rehabilitation program, which was a lumbar MedX program and concluded that testing performed on September 25, 2012, indicated that claimant did not give full effort. He advised claimant of the importance of giving full effort. (Ex. 8, p. 15) Dr. Herrera continued to question claimant's effort in the rehabilitation program and eventually stopped the monitored program and gave him home exercises on October 25, 2012, for two weeks. (Ex. 8, p. 19) On November 8, 2012, a decision was made to "stop rehab" and to proceed with pain management. (Ex. 8, pp. 21, 22) Claimant was provided ibuprofen and Neurontin, with no improvement. (Ex. 8, p. 23) During claimant's treatment with Dr. Herrera, his medication was changed from Neurontin to Lyrica with no improvement, and then to Cymbalta, also with no improvement. (Ex. 8, pp. 25, 27, 29) Claimant was sent for another FCE, this time with Marcus Witter, PT, at Workforce Assessment, LLC. (Ex. 13, p. 1)

On April 18, 2013, Mr. Witter concluded following the FCE that claimant's "findings during this evaluation were not always consistent with anatomical and physiological principles and his test results were considered [i]nvalid." (Id.) He noted that claimant failed 31 of 49 validity criteria. The therapist estimated that claimant should be able to work in the medium/heavy physical demand category. (Id.)

On May 2, 2013, claimant was seen by Dr. Herrera. (Ex. 8, p. 29) He noted that the FCE with Mark Witter indicated a poor effort and invalid results, and that this is the second invalid FCE he has undergone, with similar results. Dr. Herrera also stated that claimant was taking ibuprofen about two times per week as needed, was not doing his home exercises, and he was not walking as instructed. (Id.) Dr. Herrera released claimant to return to work at full duty with no restrictions, although he suspected "that patient will limit his activities as he tolerates," and further stated that "[i]t is felt that

patient has reached maximum medical improvement." (Id.) He was then released with no further follow-up.

On May 9, 2013, Dr. Herrera assigned a zero percent impairment. (Ex. 8, p. 31)

On September 18, 2013, James Devney, D.O., issued a report to defense counsel following an independent medical evaluation (IME) of claimant. (Ex. 14, p. 1) At the time of the exam, claimant described chronic low back pain and intermittent bilateral posterior thigh pain, numbness and tingling that came on after the work injury and continued to persist. (Ex. 14, p. 4) He reported his pain between 9-10/10. (Id.) Dr. Devney found that claimant had among other things: lumbar disc degeneration; lumbar spondylolisthesis; lumbar spondylosis; lumbar disc displacement; an annular tear; epidural lipomatosis; bilateral lower extremity paresthesias; and, symptom magnification. (Ex. 14, p. 5) Dr. Devney concluded that none of these diagnoses are related to the September 15, 2011, work injury. (Id.) Dr. Devney's impression of claimant is best summed up by his own words:

> Mr. Kool states that through extensive and appropriate conservative care, nothing has provided even the slightest of benefit. Various diagnostic/therapeutic procedures to include sacroiliac joint injections, facet joint injections and lumbar epidural steroid administration have failed at identifying a pain source. Mr. Kool has failed validity criteria during two separate functional capacity evaluations performed by different therapists at different locations. He has demonstrated positive Waddell signs which were collaborated during his independent medical examination and are an indicator of symptom magnification. Anatomic imaging shows findings most consistent with a preexisting and longstanding degenerative process. Collectively, Mr. Kool's presentation is inconsistent with physiologic parameters. There is no objective and/or rational basis for ascribing permanent impairment or permanent physical capacity restrictions based on described work events of 9/15/11.

(Ex. 14, p. 6)

Dr. Devney then assigned a zero percent impairment and as stated above, found no basis for permanent restrictions. (Id.) Claimant testified that Dr. Devney spent about five minutes with him during the evaluation. (Tr. p. 54)

On April 14, 2014, C. Robert Adams, M.D., issued a report to claimant's counsel following an IME. (Ex. 19, p. 1) Claimant reported doing unrestricted physical labor prior to his work injury on September 15, 2011. He reported "he has ongoing persistent and troublesome back pain that has not responded to a wide variety of treatments." (Id.) Dr. Adams noted that he has lumbar stenosis, mechanical back pain, and radicular pain "generated by a fall as has been described September 15, 2011. There appear to be no other precipitating factors that have caused that problem and diagnosis." (Ex. 19, p. 4) "Similarly, he has right knee arthropathy and possibly ligamentous and/or

meniscal tear and instability of the right leg, which are subsequent injuries occurring in and around the fall of September 15, 2011." (Ex. 19, p. 5) Dr. Adams stated that "[i]t is clear that the physical therapists . . . Dr. Martin and Dr. Herrera are overlooking his lumbar spinal stenosis, his radiculopathy, and the unstable symptomatic posttraumatic right knee arthropathy in recommending full and unrestricted physical labor." (Ex. 19, p. 5) Dr. Adams disagrees with Dr. Devney's assessment of neck and low back pain "of uncertain etiology," stating that longstanding character of his disk degeneration must be qualified "in that he had acute back trauma and exacerbation and precipitation of symptomatic disk disease and radiculopathy with the September 15, 2011, accident." (Id.) After additional critiques of the previous physician opinions, Dr. Adams recommended an MRI of the right knee, EMG testing of his legs and neurosurgical spinal intervention for the moderate to severe spinal stenosis at L3-4. (Ex. 19, p. 6) Dr. Adams stated that the "lumbar spinal stenosis delineated on the MRI imaging is very significant and would account for his complaints." (Id.) Dr. Adams opined that claimant is not yet at maximum medical improvement (MMI) and permanent impairment should be considered after additional treatment is provided for his back and right knee. He assigned restrictions "[a]t this point," of: 20 pounds lifting occasionally, avoid awkward lifting, repeated bending and stooping and long periods of standing. (Id.) Claimant testified that Dr. Adams spent about 15 minutes with him during the evaluation. (Tr. p. 55)

On July 14, 2014, claimant was seen by Frank Marino, D.O., at which time he reported continuing backache and numbness of his bilateral legs. He reported that he last worked in December 2012 and "he has been in pain all the time." (Ex. 15, p. 1) He also reported continued right knee pain. (Id.) An MRI of the lumbar spine was obtained on July 28, 2014, which indicated "[s]table multilevel degenerative disease" and "[d]iffuse disc bulge with more focal broad-based left neural foramen disc osteophyte complex causes severe left L4-5 neural foraminal stenosis." (Ex. 15, p. 6)

Claimant wanted another surgical consultation to see if there were any surgery options for his back. Defendants authorized a visit with Mitchell Johnson, D.O., of the Orthopedic Institute. (Tr. pp. 48-49; Ex. B, p. 1)

On November 7, 2014, claimant was as seen by Dr. Johnson. (Ex. 16, p. 1) At that time, claimant reported continuing back pain, and denied any radicular pain into his legs. He noted that the MRI "shows no evidence for nerve root impingement," but does show "[d]egenerative disease and facet arthropathy at multiple levels." (Id.) Dr. Johnson did not recommend surgical intervention or any other treatments and suggested that claimant stay as active as he can. (Id.)

On March 10, 2015, claimant's counsel wrote a letter to defense counsel seeking authorization for claimant to return to Dr. Espiritu at CNOS for further surgical evaluation. (Ex. 206) Defendants declined to authorize the requested care, citing the fact that claimant had "been seen by a number of physicians, none of whom have recommended surgery . . . .". (Ex. 207)

On April 8, 2015, claimant returned to Dr. Espiritu on his own health insurance seeking treatment for his ongoing back pain and occasional pain on the outer aspect of his legs. (Ex. 2, pp. 11, 13) He noted that "[n]othing has helped him so far and this may be indicative of the fact that he just has diffuse facet arthropathy causing him pain." (Ex. 2, p. 13) But, Dr. Espiritu agreed with the prior surgeons that claimant is not a candidate for surgery. Dr. Espiritu recommended bilateral SI joint injections. (Id.)

On April 24, 2015, claimant was seen by Jeremy Poulsen, D.O., at the Siouxland Pain Clinic. (Ex. 17, p. 1) Bilateral sacroiliac joint injections were administered. (Ex. 17, p. 4)

On May 13, 2015, claimant returned to Dr. Espiritu who noted that claimant indicated a 30 percent relief of his pain from the injections, with some days better than others. (Ex. 2, p. 14) It was again expressed to claimant that he is not a good surgical candidate and also that his symptoms do not correlate with the findings on the MRI. Conducting bilateral lower extremity EMGs was discussed to rule out any radicular symptoms from his back. (Ex. 2, p. 16)

On June 3, 2015, the lower extremity EMG was conducted. (Ex. 2, pp. 17-20)

On June 24, 2015, claimant was seen again by Dr. Espiritu who noted that the EMG study demonstrated "mild left L5 radicular irritation as well as clinical symptoms possibly consistent with bilateral meralgia paresthetica, which could not be confirmed with EMG." (Ex. 2, p. 22) Dr. Esipirtu again confirmed that claimant was not a candidate for surgery and recommended that he follow-up with Dr. Poulsen and return on a p.r.n. basis.

On July 1, 2015, claimant returned to Dr. Poulsen who noted that claimant had only about 10 percent relief from the injections. (Ex. 17, p. 6) Dr. Poulsen noted that the EMG showed questionable L5 radiculopathy and possible myalgia paresthetica. The MRI showed issues at L3-4 and L4-5 and that these levels along with the EMG study, "would coincide with the area and levels that he has pain." (Ex. 17, p. 6) Claimant advised that he was not taking any medication at that time and his pain was unrelenting. Dr. Poulsen recommended an L4-5 interlaminar epidural steroid injection. The injection was administered on July 16, 2015. (Ex. 17, p. 9)

On August 20, 2015, claimant returned to Dr. Poulsen and noted that after the injection, he continued to have severe low back pain extending into the right hip and lateral aspect of the thigh, which does not extend as far down the leg as it did before. (Ex. 17, p 12) Dr. Poulsen determined that based on these results, it is unlikely that claimant has meralgia paresthetica. It was recommended that claimant undergo bilateral L3-4 and L4-5 lumbar facet injections. The injections were administered on September 3, 2015. (Ex. 17, pp. 15-17)

On November 12, 2015, claimant was seen by Dr. Paulsen and reported about 20 percent relief following the facet injections. Claimant also reported being frustrated

by the lack of significant improvement. (Ex. 17, p. 18) Dr. Paulsen recommended a left L4-5 transforaminal epidural steroid injection, which was accomplished on November 25, 2015. (Ex. 17, p. 23)

Claimant then went to Chris Coronett, M.D., via a referral through his family physician, Dr. Marino.

On January 11, 2016, claimant was seen by Dr. Coronett. (Ex. 18, p. 1) He recorded that claimant "does a lot of heavy lifting and bending." (Id.) Claimant described his pain as 8/10. (Ex. 18, p. 2) Claimant wanted to consider surgical options for treatment, but Dr. Coronett stated that "any surgery would not really help with his low back pain or right lower extremity pain." (Id.) A recommendation was made for a repeat MRI, which was done on January 11, 2016. (Ex. 18, p. 4)

On February 3, 2016, claimant returned to Dr. Coronett who stated "there is nothing severe happening on the MRI." (Ex. 18, p. 3) Dr. Coronett also stated, "He does have some foraminal stenosis on the left at L4-5, disk protrustion there in the foramen, which is in my opinion, essentially unchanged from his MRI from 2000 [*sic*]. This did all stem from a worker's [*sic*] compensation injury in 2011, so he has had pain for five years." (Id.) Dr. Coronett remained of the opinion that surgery was not recommended. Claimant wanted to see a new pain physician, and a referral was to be made to Dr. Piperis and he was to follow-up with Dr. Coronett thereafter if needed. (Id.) There were no additional records presented concerning any additional care.

From 2008 through 2012, while working at Brouillette Body Shop, claimant earned between $65,000.00 and $68,000.00 per year. (Ex. 203) He earned $25.75 per hour. (Ex. C, p. 7) Claimant's wage information from his new employer, Bort Auto Body, shows that he earns about $52,000.00 per year. (Ex. 203) At Bort Auto Body, claimant earns about $20.00 or $22.00 per hour. (Tr. p. 56)

Claimant testified that his back condition has affected his income because he is not able to do the full range of auto body jobs that had done before the work injury. (Tr. p. 41) Claimant stated that he has suffered an $18,000.00 to $20,000.00 per year loss in income. (Tr. p. 42)

I find that claimant's reduced annual earnings are consistent with his reduced hourly wage. He went from $25.75 per hour to $20.00 and $22.00 per hour, or a 78 to 85 percent reduction. His annual income dropped at a similar rate from 76 to 80 percent, going from $65,000.00 to $68,000.00 per year to $52,000.00 annually.

Claimant agreed that if Brouillette Body Shop had not closed, he would still be working there. (Tr. p. 65)

Claimant testified that after the work injury, he has difficulty with tasks that he used to do in his former job, such as climbing up a ladder and working on a ladder, reaching, bending, and lifting. (Tr. pp. 43-44)

Although Dr. Adams assigned restrictions, as stated above, in the "real world" claimant testified that he violates the proposed restrictions on a "regular basis," because the jobs require it. (Tr. pp. 45-46) I find that claimant had been consistently working beyond the restrictions assigned by Dr. Adams for two years by the time the hearing occurred.

Claimant stated that since the work injury, his pain has not improved in any way on a consistent basis. (Tr. p. 51) Although he continues to do work around the house, such as mowing the yard, he stated that it takes longer to finish than it did before and aggravates his pain. (Tr. p. 52)

Concerning the claim for temporary benefits from December 21, 2012 through September 15, 2014, the parties agree that claimant was off work during that period of time. (Hearing Report, p. 1) Following the work injury on September 15, 2011, claimant continued to work full-time for Brouillette Body Shop, until it permanently closed on December 21, 2012. (Tr. p. 65) After the shop closed, claimant began receiving temporary total disability benefits from December 22, 2012 through January 16, 2013. (Ex. B, p. 1) Claimant's benefits were converted by the defendants to permanent partial disability benefits on January 17, 2013 and continued through April 24, 2013 and then paid again for the period of May 2, 2013 through July 2, 2013. (Ex. B, p. 1) Claimant was unemployed from December 22, 2012 until he began his job at Bort Auto Body on about September 15, 2014. (Tr. p. 40)

On January 16, 2012, almost a year before Bouirellette Body Shop closed its doors, Dr. Martin stated that claimant had reached MMI. (Ex. 5, p. 9) An FCE was conducted that was determined to be invalid and claimant was seen again by Dr. Martin on January 30, 2012, at which time, he confirmed that claimant was not a surgical candidate and released him to return to work with no restrictions. (Ex. 5, p. 13) However, claimant's complaints of pain persisted and he received substantial medical care thereafter, including multiple injections.

On December 13, 2012, about one week prior to Brouillette Body Shop closing, Dr. Herrera did not believe that claimant had reached MMI and it is noted that "[h]e continues to work with no change in his restrictions." (Ex. 8, pp. 25-26) Claimant continued under restrictions from Dr. Herrera until being placed at MMI and being returned to work without restrictions on May 2, 2013. (Ex. 8, p. 29) Also, both claimant and Scott Brouillette stated that claimant was working with accommodations after the injury up until the shop closed. (Tr. p. 29; Ex. 205, pp. 7-9)

On May 2, 2013, in addition to placing claimant at MMI and returning him to work with no restrictions, Dr. Herrera also assigned a zero percent impairment and noted that claimant was taking ibuprofen twice per week, was not doing home exercises or walking as instructed and that the second FCE conducted on April 18, 2013, was deemed invalid, like the first FCE. (Ex. 8, pp. 29-31)

On September 18, 2013, Dr. Devney assigned no permanent restrictions and zero percent permanent impairment. (Ex. 14, p. 6)

On April 14, 2014, Dr. Adams, opined that claimant was not yet at MMI, and assigned restrictions "[a]t this point," of: 20 pounds lifting occasionally, avoid awkward lifting, repeated bending and stooping and long periods of standing. (Ex. 19, p. 6)

Dr. Adams opined that claimant has not yet reached MMI despite multiple consultations with a number of physicians, multiple treatments of various modalities and multiple opinions that claimant is not a surgical candidate. I respectfully decline to follow Dr. Adams' opinion concerning MMI when viewing the entirety of the evidence and I find that Dr. Herrera's assessment of MMI is more reasonable and persuasive.

I find that claimant returned to work on September 16, 2011, the day after his injury occurred on September 15, 2011 and continued worked with accommodations at Brouillette Auto Body until it closed on December 21, 2012.

I find that when Brouillette Body Shop closed on December 21, 2012, the restrictions assigned by Dr. Herrera remained in place until May 2, 2013, when Dr. Herrera stated that claimant had reached MMI and released him to return to work without restrictions.

Although claimant continued to have additional medical treatment after Dr. Herrera's assessment of MMI, claimant stated that his condition did not improve for any sustained period of time. (Tr. p. 51)

I find that claimant, after Brouillette Body Shop closed, remained under restrictions that prevented him from returning to substantially similar employment that he was engaged in at the time of the work injury, without accommodation, and that he had not yet reached MMI until May 2, 2013 and is therefore entitled to temporary total disability benefits from December 22, 2012 until May 2, 2013.

Concerning permanent impairment, claimant has described ongoing pain and symptoms, and has testified that no medical treatments have provided any consistent relief. (Tr. p. 51) He has been told by a number of physicians that he is not a surgical candidate. He has undergone two FCEs that were deemed invalid.

After the injury, he returned to work with some accommodation at Brouillette Auto Body and then at Bort Auto Body and continues to work for this employer. He is presently engaged in the same type of work that he was doing at the time of his injury, although he tries to avoid certain aspects of the job that aggravate his pain. He attributes his reduced annual wage to his reduced ability to perform his auto body repair job. However, his reduced annual wage correlates most significantly to his reduced hourly wage. His reduced hourly wage is derived from a job change due to his original employer closing down, not because he sought out another job due to the work injury.

It is significant that: Dr. Martin assigned zero percent (0%) permanent impairment and no permanent restrictions; Dr. Herrera assigned zero percent (0%) permanent impairment and no permanent restrictions; and, Dr. Devney assigned zero percent (0%) permanent impairment and no permanent restrictions. (Ex. 5, p. 13; Ex. 8, pp. 29, 31; Ex. 14, p. 6) I note that no physician has rendered an opinion assigning any permanent impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Dr. Adams does not assign any permanent impairment rating, but does indicate that claimant should have current restrictions. However, he has also concluded that claimant has not yet reached MMI, and therefore indicates that the work restrictions are appropriate "[a]t this point," indicating that these may not be permanent restrictions. (Ex. 19, p. 6) However, even if I were to conclude that the restrictions assigned by Dr. Adams are permanent in nature, I must also note that claimant testified that he regularly violates the restrictions while performing his current job at Bort Auto Body. Claimant has worked at Bort Auto Body since September 15, 2014, or for about two years before the hearing. I find that claimant's continued consistent violation of the restrictions recommended by Dr. Adams indicates that his physical capabilities exceed the limitations set forth in the restrictions.

I find that based on the opinions of Dr. Martin, Dr. Herrera and Dr. Devney, claimant has failed to carry his burden of proof that he has sustained permanent impairment as a result of the September 15, 2011 work injury.

Concerning the claim for medical expenses, I find that the employer was aware that claimant was going to Wagner Chiropractic and that the treatment occurred after the employer was aware of the work injury, but before claimant was directed to any other provider by the defendants. (Tr. p. 27) I find that the Wagner Chiropractic treatment claimant received was reasonable and more beneficial than the lack of treatment provided by defendants. (Ex. 101)

On March 12, 2015, defense counsel wrote a letter denying any further surgery consultations, in response to claimant's request to return to Dr. Espiritu for additional evaluation. (Ex. 206; Ex. 207) Claimant seeks payment of medical expenses as contained in Exhibits 102 through 106 and summarized in Exhibit 107, which were incurred after defendants' denial.

Claimant agreed that from the time of the injury, up to the time of the hearing, his pain condition had not been relieved on any consistent basis. (Tr. p. 51) However, the unauthorized treatment that claimant received after March 12, 2015, particularly in the form of injections, did provide some measure of relief. The records indicate that claimant received temporary relief in the range of 10 to 30 percent after the various injections were administered. I find that the treatment was being recommended by appropriate medical providers and that although the medical treatment was not authorized, it was nevertheless reasonable and beneficial and provided a better outcome than the lack of authorized care provided by defendants. I therefore find that

the medical expenses contained in Exhibits 101 through 106 and summarized in Exhibit 107 are reasonable and were beneficial to claimant, and the defendants should be obligated to pay the same.

CONCLUSIONS OF LAW

The first issue in this matter is whether claimant is entitled to healing period benefits for the period of December 21, 2012 through September 15, 2014.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

I found above that claimant continued to work for the defendant employer until it closed its doors on December 21, 2012, and claimant remained under restrictions and was not able to perform the full duty type of work that he was engaged in at the time of the work injury and that he did not reach MMI until May 2, 2013. He is therefore entitled to temporary total disability benefits from December 22, 2012, the first day after claimant's job ended until May 2, 2013.

However, defendants have previously paid weekly benefits from December 22, 2012 through April 24, 2013, and again from May 2, 2013 through July 2, 2013. Although some of these benefits were titled permanent partial disability benefits by the insurance carrier at the time of payment they are appropriately classified as temporary total disability benefits based on this decision and defendants are entitled to a credit for these weekly benefit payments against the above award of temporary total disability.

The second issue is the extent of permanent disability resulting from the stipulated work injury.

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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).

As stated above and upon reliance of the opinions of Dr. Martin, Dr. Herrera and Dr. Devney, I have found that claimant has failed to carry his burden of proof concerning the establishment of a permanent injury as a result of the September 15, 2011 work injury, and therefore is not entitled to permanent partial disability benefits.

The next issue is the appropriate commencement date for permanent partial disability benefits. This issue is rendered moot by the above finding that claimant has failed to carry his burden of proof that he sustained a permanent injury.

The next issue is the reimbursement of 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).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

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 have found above that the medical expenses contained in Exhibits 101 through 106 and summarized in 107 are reasonable and were more beneficial to the claimant than the lack of care being provided by defendants. I conclude that defendants should be responsible for payment of the same.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude based on my discretion that it is appropriate that each party shall pay their own costs.

ORDER

IT IS THEREFORE ORDERED:

Defendants are obligated to pay claimant temporary total disability benefits from December 22, 2012 until May 2, 2013. However, defendants shall be entitled to credit for all weekly benefits paid to date.

Claimant shall take no permanent partial disability benefits.

All weekly benefits are to be paid at the stipulated rate of seven hundred twenty and 47/100 dollars ($720.47).

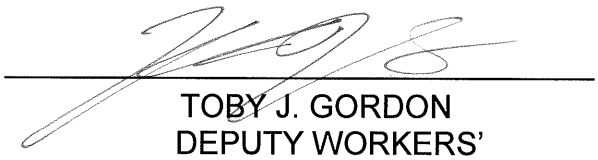
Defendants shall pay interest on accrued weekly benefits, if any, pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in Exhibits 101 through 106 and summarized in Exhibit 107 and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Each party shall pay their own costs.

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

Signed and filed this 27th day of June, 2017.



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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.