BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY MCWILLIAMS, Claimant, vs. ALL LINES PAINTING, Employer, and AUTO-OWNERS INSURANCE, Insurance Carrier, Defendants.	FILED APR 18 2018 WORKERS COMPENSATION	File No. 5057077 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Jerry McWilliams, claimant, filed a petition in arbitration seeking workers' compensation benefits from All Lines Painting, Inc. (All Lines) and its insurer, Auto-Owners Insurance Company as a result of an injury he allegedly sustained on December 17, 2015 that allegedly arose out of and in the course of his employment. This case was fully submitted on October 3, 2017. The evidence in this case consists of the testimony of claimant, Nova Janssen, Claimant's Exhibits 1 – 12, Defendants' Exhibits A – E and G and Joint Exhibits 1 – 28. Both parties submitted post-hearing briefs.

ISSUES

Whether claimant sustained an injury on December 17, 2015 which arose out of and in the course of employment;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability;

Whether claimant is entitled to payment for an independent medical examination (IME);

Whether claimant's medical expenses are related to his alleged work injury and whether he is entitled to payment of these medical expenses; and

Assessment of costs.

STIPULATIONS

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

FINDINGS OF FACT

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

Jerry McWilliams, claimant, was 55 years old at the time of the hearing. He completed the 10th grade and then dropped out of school. (Transcript, page 10; Exhibit D, page 3) Claimant has no other formal education and does not have a GED. (Ex. A, p. 18) Claimant has spent his adult life primarily as a painter. (Ex. 6, pp. 48, 49; Ex. A, p. 19) Claimant started working in 1998 for painting companies. (Tr. p. 54) Claimant started working for All Lines as a painter in 2009. (Ex. D, p. 4; Ex. 5, p. 40) Claimant's last day he was at work for All Lines was December 16 or 17, 2015. (Ex. 9, p. 58) Claimant told his boss that he was all done. (Tr. p. 33) Claimant, in a recorded statement for the defendant of February 22, 2016, said that he told his employer he needed time off so that that his injection would work, but he did not quit. (Ex. 5, pp. 41, 43) Claimant sent a text message to his employer on January 7, 2016 requesting that his employer start the process for a workers' compensation process for his condition. Claimant sent a letter and email on February 27, 2016 requesting his employer initiate a workers' compensation claim. (Ex. 9, p. 58; Ex.10, p. 59) Claimant said that he did not quit but was not able to continue working. Claimant generally described the physical requirements of being a painter, which included working and moving ladders, going up and down a lot as well as a lot of overhead work. (Tr. p.13) Claimant would also use a sprayer, move furniture, move machinery and carry 5 gallon paint containers. (Tr. pp. 16, 17; Ex. A, p. 150)

Claimant agreed that the pain in his neck started in May of 1999. (Tr. p. 54) Claimant received care for his back pain by Clay Ransdell, D.O. in September 2007. (JE 22, p. 81) Claimant had arthroscopic surgery on his left shoulder in 2007. (JE 19, p. 75)

On March 16, 2010, Thomas Carlstrom, M.D. wrote claimant's primary physician and noted that claimant had left-sided radiculopathy. (JE 6, p. 8) In May 2016,

Dr. Carlstrom scheduled surgery. On June 9, 2010, Dr. Carlstrom performed surgery on his spine. Claimant had a fusion of the C3 - C4 and C4 – C5 vertebrae. (JE 6, p. 15; Tr. p. 58) The postoperative diagnosis was cervical radiculopathy. He was working for All Lines at that time, but did not claim a work injury. (Tr. p. 18) He last saw Dr. Carlstrom on July 19, 2010. (Ex. 6, p. 19) Claimant testified that he thought the surgery was successful and he was able to resume his work at All Lines without restrictions. (Tr. pp. 19, 20) Claimant received 24 chiropractic treatments after his surgery up until May 2014. (Tr. p. 59) On May 7, 2014, Kyle Haskin, D.C. assessed claimant with: "1: Cervical subluxation (739.1), 2: Thoracic subluxation (739.2), 3: Lumbar subluxation (839.20)." (JE 10, p. 34) Claimant had chiropractic treatments on November 2015 and December 2015. (Tr. pp. 63, 64) Dr. Haskin's diagnosis on November 16, 2015 through February 2016 was, "1: Segmental and somatic dysfunction of cervical region (M99.01), 2: Segmental and somatic dysfunction of thoracic region (M99.02), 3: Segmental and somatic dysfunction of lumbar region (M99.03)." (JE 10, pp. 40, 55) Claimant had other chiropractic treatments, but stopped these treatments in February 2016. (Tr. p. 66) Claimant also had acupuncture for his back pain. (Tr. p. 69)

Claimant had an MRI on June 6, 2014. The MRI showed moderate to severe neural foraminal narrowing and a referral to a surgeon was recommended. (JE 12, p. 58) Claimant saw Dr. Ransdell on July 14, 2015 and assessed claimant with "1. Cervical pain. 2. Cervical radicular pain." (JE 22, p. 83) And Dr. Ransdell provided claimant his first cervical injection on July 31, 2014. (JE 22, p. 85; Tr. p. 60) Claimant received a second injection on September 30, 2015 and another injection January 6, 2015. (JE 22, p. 88)

Claimant testified that he began having whole arm pain in his left arm in May 2014 and he went to Lori Miller, D.O. (Tr. p. 20) Claimant was referred to Dr. Ransdell and he had a series of injections through December 14, 2014. Claimant was laid off and returned to work for All Lines in July 2015. (Tr. p. 22) Claimant said that his back condition calmed down when he was off work. (Tr. p. 71) Claimant was performing his regular duties when he returned to work. (Tr. p. 23) Claimant said that initially he was doing well, but slowly everything flared up. (Tr. p. 23)

Claimant returned to Dr. Ransdell's office on November 12, 2015. Claimant informed Melissa Jacoby, ARNP, he that he had obtained 60-70 percent relief from his last injections up to 3 to 4 weeks ago. (JE 22, p. 93) Claimant was seen by Jason Brehmer, D.O. on November 25, 2015 for ongoing lower back pain that was going into his leg and groin. Dr. Brehmer assessed claimant with chronic pain syndrome and bilateral low back pain without sciatica. (JE 13, p. 60) On November 30, 2015, Callie Waller, D.O. saw the claimant. Her assessment was, "Back pain of lumbar region with sciatica." (JE 13, p. 63) On December 7, 2015, Dr. Ransdell provided another injection. His assessment was,

Assessment/Plan

#	Detail Type	Description

1. Assessment	Cervicalgia (M54.2).
2. Assessment	Radiculopathy, cervical region (M54.12).
3. Assessment Patient Plan	Spinal stenosis, cervical region (M48.02). W[e] will do CESI today
4. Assessment Patient Plan	Low back pain (M54.5). We will get MRI of lumbar spine and prescribe PT.
5. Assessment	Lumbar Disc Displacement (M51.26).
6. Assessment	Radiculopathy, lumbosacral region (M54.17).
7. Assessment Plan Orders	Overweight (E66.3). Today's instructions / counseling include(s) Lifestyle education regarding diet.
8. Assessment Plan Orders	Essential (primary) hypertension (I10). Today's instructions / counseling include(s) Diet education (procedure).

(JE 22, pp. 99, 100) Dr. Ransdell last saw claimant on February 8, 2016 for claimant's lumbar spine pain and received an injection. (JE 22, p. 104)

On December 15, 2015, claimant had an MRI. The impression from the MRI was,

> Mild two-level degenerative disease of the lumbar spine at L4-L5 and L5-S1. At both levels there is mild disc degeneration with disc bulging and mild facet arthritis with findings greater on the left side. This results in slight left lateral recess encroachment at L4-L5 potentially causing a source of irritation of left L5 nerve although no critical stenosis or high-grade nerve root compression is noted on this static examination.

(JE 24, pp. 109, 110) On December 15, 2015, claimant was at work and was experiencing significant pain and had a physical therapy appointment scheduled for after work. Claimant left work early that day and attempted to work the next day but determined he could not work and informed his supervisor he was done. (Tr. p. 33) Claimant was released to return to work on December 28, 2015 by Kenna Willey, PA-C. (Ex. 15, p. 71) Claimant has not worked since that time. (Ex. A, p. 7) On December 17, 2015, claimant received an injection of Toradol due to his extreme pain. (JE 13, p. 64)

Claimant went to his family physician, Dr. Miller, on January 12, 2016 to discuss the results of an MRI ordered by Dr. Ransdell. Dr. Miller noted an L4-5 issue on the left, but it did not explain all of his issues. She noted he remained off work. (JE 13, p. 69)

Claimant had an MRI of his cervical spine on February 22, 2016. This MRI showed,

1. Findings in keeping with solid anterior fusion from C3 through C5 as detailed above.

2. Spondylosis with moderately severe disc degeneration at C5-C6 and C6-C7.

3. Vertebral endplate spur formation and even some facet arthropathy causes neural foraminal encroachment at C5-C6, worse on the right which could cause irritation of the right C6 nerve root.

4. Bony dominant neural foraminal stenosis on the left at C6-C7 is high-grade exacerbated by shallow lateral intraforaminal disc herniation potentially resulting in left C7 radiculopathy as well.

(JE 25, p. 112)

Claimant was seen by Jacqueline Stoken, D.O. on February 23, 2016. Claimant was complaining of pain in his neck, low back, legs and aching in his arms. Dr. Stoken's impressions were,

1. Multilevel degenerative disk disease in the cervical and lumbar spine.

2. Status post cervical fusion and C4 through C6.

3. Advanced spondylosis of the cervical spine.

4. Lumbar spondylosis with left lower extremity radiculopathy.

5. Anxiety and depression.

(JE 16, p. 114) Dr. Stoken recommended and provided acupuncture as well as continuation of other treatments. (JE 26, p. 115) She provided ten acupuncture treatments through May 2016. (JE 26, p. 143)

Claimant was evaluated by David Hatfield, M.D. in June 2016 who told claimant he did not believe surgery would improve his condition and suggested a referral to the Mayo Clinic. (Tr. p. 40; JE 28, p. 169)

Claimant went to the Mayo Clinic on July 25, 2016. Keith Bengtson, M.D. assessed claimant with "Widespread pain in the setting of generalized anxiety." (JE 27, p. 147) Dr. Bengtson did not believe that there was a surgical option for the claimant and referred him to the "Fibromyalgia Clinic" due to his widespread pain and anxiety.

(JE 27, p. 147) On September 22, 2016, Kevin Fleming, M.D., from the Mayo Clinic wrote his impressions were,

> #1 Chronic widespread pain
>
> #3 [*sic*] Fibromyalgia
>
> #3 Chronic multifactorial fatigue
>
> #4 Obstructive sleep apnea, on CPAP
>
> #5 Possible pelvic floor dysfunction and constipation
>
> #6 Atypical chest pain
>
> #7 Chronic generalized anxiety disorder with panic episodes
>
> #8 Chronic dizziness
>
> He has had widespread pain since he was in his 20s, having had pain symptoms since she [*sic*] was 14. Chronic fatigue has been present for three years. He has been disabled from his work as a painter for the past nine months. He has chronic anxiety and multiple panic spells each day.

(JE 27, p. 151) Dr. Fleming recommended claimant complete a Fibromyalgia and Chronic Fatigue Treatment Program.

On August 11, 2016, Dr. Ransdell responded to a letter from claimant's counsel. Dr. Ransdell's assessment and diagnosis of claimant's neck condition was cervical radicular pain, spinal stenosis and cervical fusion. (JE 23, p. 107) Dr. Ransdell agreed that claimant's work activities caused his neck problems. (JE 23, p. 107) Dr. Ransdell also agreed that claimant's work activities were a substantial contributing factor to the aggravation, acceleration, worsening or lighting up of his underlying condition. (JE 23, p. 108)

Claimant applied for and was found eligible for Social Security Disability upon his application for reconsideration. The decision found him eligible after he turned 55 years old; January 12, 2017. (Ex. 7, p. 51; Ex. G, p. 1) The findings of the Social Security Administration are not binding on this agency as they apply different legal standards and are non-adversarial proceedings, but are relevant evidence to consider.

Claimant has not worked since December 2015. He does not believe he could work as a painter. (Tr. p. 46) Claimant described that he is limited in the amount of household chores he can perform. He testified he can do some light housework for limited time periods. (Tr. p. 50) Claimant was not taking any prescription medication for

his neck pain at the time of the hearing, but was scheduled for an epidural injection after the hearing. (Tr. p. 51)

Nova Janssen, claimant's wife, testified. Ms. Janssen said that claimant did well after his surgery in 2010. She said that in 2014 his back began to flare up and she was pleased when he was laid off. (Tr. p. 73) She said that claimant was doing well for the first couple months when he returned to work, however he still had back symptoms. (Tr. p. 74) Ms. Janssen said that by December 2015 claimant was unable to do anything due to his pain and stopped working. (Tr. p. 78) She said that claimant has stopped some activities such as car repairs, playing bass, picking up grandchildren, and mowing the lawn. (Tr. p. 78) Ms. Janssen said that she now does household chores claimant used to do and now does the majority of driving. (Tr. p. 79) Ms. Janssen's testimony was credible as to the limitations her husband has in performing household tasks and his very limited lifestyle.

On April 12, 2017, Robin L. Sassman, M.D. evaluated claimant and on May 19, 2017, Dr. Sassman issued her IME report. (Ex. 2, p. 5) Dr. Sassman's diagnoses were, "1. Cervical spine pain with radicular symptoms in the setting of a previous fusion. 2. Lumbar spine pain with radicular symptoms." (Ex. 2, p. 16) Concerning causation Dr. Sassman wrote,

> With regard to the cervical spine, Mr. McWilliams had a previous fusion in 2010 and this was deemed successful. We know that the presence of the hardware from the fusion places the levels above and below the fusion at risk for future injury. Based on his MRI from February of 2016, it is notable that he has some spur formation and changes that may be causing irritation of the C6 and C7 nerve roots. Based on my understanding of this job, it is my opinion that the activities of his job as a painter, with repetitive upper extremity motions and extension of his cervical s pine on a regular basis, were a substantial aggravating factor in his cervical spine and left upper extremity symptoms.
>
> With regard to the lumbar spine, when one compares the MRI of the lumbar spine from 2015 to the one from 2007, it is clear that there have been some changes, especially at the L4-5 and L5-S1 levels where there are findings that potentially could cause irritation of the L5 nerve root. This type of tissue can be substantially aggravated by the positioning and activities of painting. Mr. McWilliams states that his symptoms with the low back would wax and wane depending on the activities of his job. When he did a lot of rolling of the brush, he would note more symptoms. Therefore, it is my opinion that the activities of his job were at least a substantial aggravating factor in the lumbar spine.

(Ex. 2, p. 16) Dr. Sassman provided a maximum medical improvement (MMI) date of December 31, 2016 and provided a whole body rating of 34 percent. She recommended

restrictions of occasional lifting 10 pounds floor to waist, 20 pounds waist to shoulder and 10 pounds rarely above shoulder height. (Ex. 2, pp. 17, 18) I find that the restrictions provided in Dr. Sassman's IME report are claimant's restrictions. On July 27, 2017, Dr. Sassman wrote a letter to claimant's counsel after receiving and reviewing Charles Mooney, M.D.'s May 17, 2017 IME report. Dr. Sassman wrote that she would not change any of her opinions based upon Dr. Mooney's report. (Ex. 3, p. 22)

Dr. Mooney performed an IME on May 17, 2017. (Ex. B) Dr. Mooney's assessment was,

1. Chronic cervical disc disease, status post multilevel fusion
2. Bilateral rotator cuff repairs, secondary to chronic impingement
3. Chronic lumbar pain with mild degenerative disc disease
4. Chronic wide spread pain in the setting of generalized anxiety
5. Chronic pain syndrome

(Ex. B, p. 10) Dr. Mooney, using the Bradford-Hill criteria and the AMA Guides to the Evaluation of Disease and injury Causation, First and Second Editions, along with his evaluation of other evidence opined that claimant's work did, at most, only temporarily aggravated claimant's underlying pathology which was preexisting and naturally progressive and his work did not cause or permanently aggravate his neck condition. (Ex. B, pp. 11, 12) Dr. Mooney stated, "It is my opinion there is no causal relationship between Mr. McWilliams' cervical and lumbar disc disease and his work activities." (Ex. B, p. 12) Dr. Mooney rated claimant with a 20 percent whole body impairment due to his prior cervical fusion. (Ex. B, p. 12) Dr. Mooney stated claimant could return to normal duties as a painter in the medium category of work. And claimant could return to his position as a residential/industrial painter. (Ex. B, p. 13) Dr. Mooney noted that claimant has a significant psychological overlay which influenced claimant's current conditions. (Ex. B, p. 13) On July 7, 2017, Dr. Mooney reviewed Dr. Sassman's IME and did not change his opinions concerning the claimant. He also noted that he did not agree that claimant's degenerative lumbar disk disease was appropriately rated by Dr. Sassman. (Ex. C, p. 1)

Claimant has requested reimbursement of medical expenses in the amount of $4,887.36 for treatments at various medical providers from February 2016 through July 2016. (Ex. 11, p. 69) I find these to be fair and reasonable and causally related to claimant's December 17, 2015 work injury.

Claimant has requested reimbursement for costs in the amount of $3,949.00. The breakdown of costs shows $112.93 for filing fee and service. Claimant requests $113.75 for a December 14, 2009 deposition. (Ex. 12, p. 81) Claimant requests reimbursement for a deposition transcript of the claimant in the amount of $89.60. He is

also requesting $3,632.50 for Dr. Sassman's IME. (Ex. 12, p. 81) Dr. Sassman charged $1,477.50 for claimant's examination and $2,155 for her report. (Ex. 12, p. 85)

I find, based upon a gross weekly wage of $622.00 per week, married and entitled to claim two exemptions, claimant's weekly workers' compensation rate is $440.66.

Claimant's vocationally relevant history is that of a painter. He would have to move and carry gallons of paint, use ladders and scaffolding, look up or down on a consistent basis and paint in awkward positions. The work that claimant performs as a painter exceeds the restrictions imposed by Dr. Sassman. Claimant has a limited education. His age at the time of the hearing was 55, which is a negative factor in employment, retraining or additional education opportunities. Claimant's other preexisting conditions provide additional limitations. The Social Security Administration has found claimant to be unable to perform substantial gainful employment as it exists in the national economy. (See 20 CFR § 404.1566) Based upon the evidence present, I find claimant has a 100 percent loss of earning capacity.

RATIONALE AND CONCLUSIONS OF LAW

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

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).

I find that claimant has proven by a preponderance of the evidence that his work for All Lines from July through December 2015 was substantial contributing factor to the aggravation, acceleration, worsening or lighting up of his underlying condition. I found the medical opinions of Dr. Ransdell and Dr. Sassman the most convincing medical evidence as to causation. Dr. Ransdell saw the claimant over a number of visits and treatments. Dr. Sassman's IME was more thorough than Dr. Mooney's. I did not find Dr. Mooney's report convincing. He discounts cumulative trauma for permanent aggravation of claimant's back. Based upon the evaluations from the Mayo Clinic, claimant may have a psychological overlay to his back conditions. However the evidence is that his back condition was permanently lighted up with his work with All Lines. The claimant has a cumulative trauma that manifested itself on December 17, 2015: claimant's last day of work.

Claimant had cervical fusion in 2010. He was able to return to work full duty for a number of years after this surgery. Clearly claimant has preexisting conditions that now contribute to his disability. However, his work at All Lines and cumulative injury of December 17, 2015 has increased his disability. Claimant has met his burden of proof.

Claimant sustained a cumulative injury to his cervical and lumbar back due to his work at All Lines with an injury date of December 17, 2015.

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

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

Compensation 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

As noted in the findings of fact, claimant is 55 years old with a limited education. His only relevant vocational history is that of a painter. His limitations prevent him from performing his work as a painter. He has not been able to work since December 17, 2017. I previously found claimant has a 100 percent loss of earning capacity. I find claimant has proven that as a result of his injury with All Lines he is permanently and totally disabled. Claimant's permanent total benefits commence on December 31, 2016.

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).

I find that claimant is entitled to healing period benefits beginning on December 18, 2015 and ending on December 30, 2016.

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).

I found that claimant's medical expenses were casually related to his injury of December 17, 2015. I order the defendants to pay the medical expenses found in Exhibit 11 in the amount of $4,887.83. Defendants shall reimburse claimant any out of pocket expenses directly.

Claimant has requested payment for certain costs.

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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. 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).

In this case Dr. Sassman conducted her IME examination before Dr. Mooney performed his. There is no evidence in the record to show that the IME performed by Dr. Sassman was done because the claimant believed the defendant had obtained a rating that was too low. I find that claimant has failed to prove entitlement to the full reimbursement of the reasonable cost of Dr. Sassman's IME.

Iowa Code section 86.40 states:

> **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:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be... (3) costs of service of the original notice and subpoenas, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, . . .

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The Iowa Supreme Court provided guidance on whether the full cost of an IME may be taxed as a cost pursuant to rule 876 IAC 4.33 if that IME does not qualify for reimbursement under Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, (Iowa 2015). In Young, the Court clarified that rule 876 IAC 4.33 allows only for the taxation of costs "incurred in the hearing." A physician's report becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. However, the Court has indicated that the report is separate from the examination. The Court indicated that if an injured worker sought reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. (Id., pp. 846-847)

I find that claimant is entitled to reimbursement of some costs that include filing fee and service fees ($112.93), deposition costs ($89.60) and the costs of Dr. Sassman's report, not examination, of ($2,155.00). I am declining to award the December 14, 2009 deposition costs and the costs of the IME examination by Dr. Sassman.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from December 18, 2015 through December 30, 2016 at the weekly rate of four hundred forty and 66/100 dollars ($440.66)

Defendants shall pay claimant permanent and total benefits for so long as claimant is permanently and totally disabled commencing on December 31, 2016 at the weekly rate of four hundred forty and 66/100 dollars ($440.66).

Defendants shall pay medical costs and other costs as set forth in this decision.

Defendants shall pay any past due amounts in a lump sum and interest as provided by law.

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 18th day of April, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/srs

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.