BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRUCE FRAKES, Claimant, vs. YELLOW FREIGHT, Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	FILED FEB 15 2019 WORKERS' COMPENSATION	File Nos. 5020033, 5063146 ARBITRATION DECISION Head Note Nos.: 1803, 2501, 2701, 2905, 2907

STATEMENT OF THE CASE

Bruce Frakes, claimant, filed two petitions for arbitration against Yellow Freight, as the employer, and Old Republic Insurance Company, as the insurance carrier. File No. 5020033 asserts an injury date of September 19, 2014. File No. 5063146 asserts an injury date of February 19, 2015. The files were consolidated for hearing, and this contested case proceeded to an in-person hearing in Des Moines on December 7, 2018.

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

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 9, and Defendants' Exhibits A through F. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified live at the time of hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on January 11, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

In File No. 5020033, the parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to review-reopening and an increase in a prior industrial disability documented in an Agreement for Settlement.

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

In their post-hearing brief, defendants appear to assert that the 2004 injury date is barred by the statute of limitations. Defendants specifically waived any statute of limitations defense on the hearing report. Therefore, defendants' statute of limitations defense will not be considered.

In File No. 5063146, the parties submitted the following disputed issues for resolution:

1. Whether the stipulated February 19, 2015 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

2. The proper commencement date for permanent disability benefits, if any.

3. Whether claimant is entitled to an award of past medical expenses.

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

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

6. Whether cost should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Bruce Frakes is a 49-year-old gentleman. He resides in Independence, Missouri. He is a high school graduate and attended 18 months at a junior college. He obtained a respiratory therapy degree and worked as a respiratory therapist for approximately ten years from 1989 through 1999. Mr. Frakes remains licensed as a respiratory therapist and concedes that he could return to work as a respiratory therapist.

While still working as a respiratory therapist, Mr. Frakes started working for Yellow Freight. He began with the employer in 1995 as an over-the-road truck driver. Mr. Frakes continued in that same capacity with Yellow Freight through the date of the

arbitration hearing. Since 1997, Mr. Frakes has worked out of the company's Kansas City terminal.

Claimant is a union member and he is responsible for driving his truck and delivering loads to various locations. However, he has no responsibilities for loading or unloading of freight. He is required to dolly down his trailers and pull the king pin to hitch or unhitch trailers from his truck.

On September 19, 2004, Mr. Frakes was at the company's loading area in Harlan, Iowa. Claimant was unhitching a loaded trailer and hitching up an empty trailer to haul back with him to Kansas City. He injured his low back while attempting to open a door on the back of the trailer to ensure it was empty. The employer accepted the September 19, 2004 injury and provided medical care for claimant.

Medical records demonstrate that claimant required conservative care for the low back injury. However, the treatment only managed symptoms and did not completely alleviate or heal the low back injury. Ultimately, the parties entered into an agreement for settlement in which the parties stipulated claimant sustained a 13.5 percent industrial disability as a result of the September 19, 2004 injury.

Mr. Frakes has continued to treat for his low back since the agreement for settlement was entered. Claimant has required periodic epidural injections and ongoing narcotic medication to manage his symptoms. That treatment has continued through the date of the arbitration hearing.

Claimant testified that his low back was deteriorating over time but only mildly until his second injury date on February 19, 2015. In fact, claimant returned to full-time work without medical restrictions after the September 19, 2014 injury and continued in that full-duty capacity until his second injury on February 19, 2015.

Review of the medical records demonstrates that claimant's condition waxed and waned after the September 19, 2004 injury. Claimant's symptoms would gradually worsen, he would then obtain an epidural steroid injection and his symptoms would subside for a period of time. With the use of injections and medication, claimant was able to continue working full-time without restrictions. The medical records do not demonstrate any significant deterioration of claimant's condition before February 19, 2015. However, on August 13, 2007, claimant reported that "He functions at work by self-limiting his activity," and, "he knows how to control his pain." (Joint Ex. 3, p. 21-22) With that understanding, claimant was released to work without medical restrictions. (Joint Ex. 3, p. 22)

Shortly before his second injury, claimant was re-evaluated by Constantine Fotopoulos, M.D. On February 9, 2015, claimant reported he had developed a funny, new feeling in his right leg going down to the top of his foot. However, Dr. Fotopoulos noted, "He also notes his back pain has been worse over the past few days but is unchanged in nature from his chronic back pain." (Joint Ex. 3, p. 70) I accept this assessment from the physician as accurate. Although claimant's symptoms had

perhaps increased, this was nothing different or strange to the waxing and waning that claimant experienced prior to February 2015.

Mr. Frakes has not proven that his permanent impairment following the 2004 injury date has increased. He experienced no change in his work status before February 19, 2015. He had no work restrictions. He continued full-time for the employer and demonstrated no actual loss of earnings between the 2004 and 2015 work injuries. I find that claimant has not proven by a preponderance of the evidence that he sustained a substantial change in condition that is attributable to the 2004 work injury. Claimant's industrial disability remains essentially the same as it was at the time of the agreement for settlement as a result of the 2004 injury date.

However, on February 19, 2015, Mr. Frakes sustained another low back injury. Mr. Frakes drove a company truck from Kansas City, Missouri to St. Paul, Minnesota on February 18, 2015, as part of his normal driving route for Yellow Freight. He stayed overnight in a motel the evening of February 18, 2015 and left St. Paul to return to Kansas City on February 19, 2015.

Upon reporting to the company's terminal, he was assigned a truck that had been in for repairs. The truck included an air-ride seat. However, the seat was under repair because it was reportedly not holding air properly.

When claimant was assigned the truck, the seat had reportedly been repaired. However, as claimant proceeded south on Interstate 35, it was apparent that the seat was losing air. Mr. Frakes testified that he hit the lip of a bridge that was not even, his seat jumped into the air and then crashed to the floor of the truck. Mr. Frakes testified that he had immediate and excruciating pain in his back and symptoms into his legs.

The employer authorized treatment and an MRI of claimant's low back was ordered. The MRI did not disclose any significant objective changes to claimant's low back. Dr. Fotopoulos evaluated Mr. Frakes on March 7, 2015. Prior to February 19, 2015, claimant carried a diagnosis of an S1 radiculopathy. (Joint Ex. 3, p. 24) On March 7, 2015, Dr. Fotopoulos added a diagnosis of facet syndrome. (Joint Ex. 7, p. 90)

On March 9, 2015, claimant returned for evaluation with Dr. Fotopoulos. Mr. Frakes reported that his pain was worse than it had been in the past. (Joint Ex. 7, p. 92) Dr. Fotopoulos continued recommendations of conservative care. However, he added a recommendation for a radio-frequency ablation, which was helpful to claimant's symptoms.

Dr. Fotopoulos declared claimant to have achieved maximum medical improvement in October 2015 and claimant returned to full-time, full-duty driving for Yellow Freight. (Joint Ex. 7, p. 122) On November 16, 2015, claimant reported that he had driven approximately 15,000 miles over the past month and experienced increased radiating pain. (Joint Ex. 7, p. 103)

Mr. Frakes returned for further care on December 10, 2015 and reported he had driven approximately 25,000 miles over the past month. With only 24 days between these appointments, this means claimant was driving nearly 1,000 miles per day for the entire period between his medical appointments. Claimant reported increased symptoms. (Joint Ex. 7, p. 106)

On February 11, 2016, claimant again presented for evaluation by Dr. Fotopoulos. At this appointment, Mr. Frakes reported that he was not driving as much and that his symptoms had decreased. (Joint Ex. 7, p. 111) This medical note corroborates claimant's testimony that he is now accepting fewer hauls than he has in the past and that his income has been reduced as a result of taking fewer loads.

Mr. Frakes testified that he is scheduled to take 12 runs on his current route from Kansas City to Dallas per month. However, he testified that he is currently only taking 6 or 7 of those runs per month. He specifically testified that he is required to leave on a trip at a scheduled time. However, if he has back pain when he is scheduled to leave, he will decline the load.

Mr. Frakes also testified that he has sufficient seniority with the union that he could bid into longer hauls and increase his pay. However, he testified that, due to his back and leg symptoms, he cannot take a longer bid or route. As an example, he testified he could bid into the Kansas City to Denver route and make significantly more money. However, he testified this route is too far so he declines that route. Mr. Frakes' testimony on his loss of income was a bit confusing. He initially estimated that skipping his scheduled trips from Kansas City to Dallas costs him approximately one-third of his annual expected wages. However, on redirect examination, claimant testified that his income was probably reduced by about 30 percent before 2015 and was decreased approximately 40-45 percent after the 2015 injury date.

Mr. Frakes testified that he has difficulty getting into and out of his truck. He continues to take Vicodin when not driving. He has obtained a radio-frequency ablation and still requires periodic epidural injections for his symptoms.

Dr. Fotopoulos opined that claimant does not require permanent restrictions, but he is also aware that claimant can and does self-limit his activities to protect his back. Dr. Fotopoulos opined that claimant continues to require epidural steroid injections and pain medications as a result of the 2004 injury. (Joint Ex. 7, p. 122) He also opined that claimant does not qualify for permanent impairment but concedes that claimant may require future radio-frequency ablations as a result of the 2015 injury. (Joint Ex. 7, p. 118)

Defendants obtained an independent medical evaluation performed by Christopher D. Fevurly, M.D. on April 18, 2017. Dr. Fevurly opined, "It is unlikely that the work event on September 19, 2004 produced any structural or anatomic change in his lumbar spine." (Defendants' Ex. C, p. 7) Yet, the parties entered into an agreement for settlement that stipulated claimant sustained permanent disability as a result of the 2004 injury. The parties' own stipulations appear to contradict Dr. Fevurly's opinions.

Dr. Fevurly opines that claimant's opiate usage and epidural steroid injections are directed at his pre-existing degenerative changes in his lumbar spine. (Defendants' Ex. C, p. 7) Yet, claimant did not require medical treatment on an ongoing basis before the 2004 injury date. Subsequent to that injury, claimant required periodic and regular care. Again, the parties' stipulations in the agreement for settlement that claimant sustained permanent disability as a result of the 2004 injury date appear to contradict Dr. Fevurly's opinions.

With respect to the 2015 injury date, Dr. Fevurly opined that claimant sustained only a temporary exacerbation of a pre-existing history of low back pain. He opines that claimant should have achieved baseline and maximum medical improvement within six weeks after the injury date. He opines that claimant sustained no permanent impairment as a result of the 2015 injury date, requires no medical restrictions from that injury, and requires no future medical treatment related to either injury date. (Defendants' Ex. C, pp. 8-9)

Dr. Fevurly's opinions contradict the reality that claimant had ongoing symptoms. I found Mr. Frakes' testimony about ongoing symptoms realistic and credible. This testimony directly contradicts Dr. Fevurly's opinions that claimant reached baseline within six weeks after the 2015 injury. Moreover, Dr. Fevurly's opinions seem to be in direct contrast to the treatment rendered by long-time treating physician, Dr. Fotopoulos. I find that claimant did not achieve maximum medical improvement or return to baseline within six weeks of the 2015 injury date. Instead, his symptoms continued, worsened upon returning to work, required a radio-frequency ablation procedure, and have caused claimant to reduce the number of loads he takes for Yellow Freight. I am not convinced by Dr. Fevurly's opinions and specifically reject them.

Mr. Frakes obtained an independent medical evaluation with Sunil Bansal, M.D. on August 31, 2018. Dr. Bansal did not review prior medical records, which hurts his credibility and history somewhat. However, Dr. Bansal cogently explained how claimant sustained an aggravation of his lumbar facet arthropathy due to the 2015 injury date. This opinion squarely fits with the diagnosis made by Dr. Fotopoulos and the new symptoms described by claimant after the 2015 injury date.

Dr. Bansal opines that claimant sustained an eight percent permanent impairment of the whole person as a result of the 2015 injury date. (Claimant's Ex. 3, p. 9) I find this to be convincing. Having rejected Dr. Fevurly's opinion that claimant sustained only a temporary exacerbation and having found ongoing symptoms, I do not find Dr. Fotopoulos' opinion about impairment accurate. Claimant clearly has some ongoing symptoms and requires ongoing care. He has sustained some permanent impairment as a result of the 2015 injury and I find Dr. Bansal's eight percent permanent impairment of the whole person to be reasonable and accurate under the facts of this case.

Dr. Bansal opines that claimant should not lift more than 20 pounds occasionally and should not bend or twist on a frequent basis. (Claimant's Ex. 3, p. 9) Given that claimant has returned to work without restrictions and continued to perform his job

duties as an over-the-road truck driver as of the date of the arbitration hearing, I do not accept Dr. Bansal's restrictions as accurate. I acknowledge the treating physician, Dr. Fotopoulos, has provided claimant a full-duty release. I find this is reasonable under the circumstances because that physician also knew from long-term experience with claimant that Mr. Frakes was able to self-monitor and prevent significant further injury (other than through a broken seat in 2015).

Considering the claimant's testimony and the competing medical opinions, and giving them the weight I deem appropriate, I find that claimant has proven he sustained a significant aggravation of his pre-existing low back condition as a result of the 2015 injury. He has proven that he sustained permanent disability, sustained an eight percent permanent impairment, that he has ongoing symptoms, requires ongoing care, and that he self-limits his job duties to protect himself. However, I find that claimant requires no formal medical restrictions at the present time and that he is capable of continuing to work as an over-the-road truck driver at the present time.

I specifically find that the stipulated February 19, 2015 injury substantially aggravated claimant's underlying condition. There is no doubt that claimant had degenerative disc disease and had underlying symptoms before February 19, 2015. However, he experienced a traumatic event on that date with immediate increase in symptoms. Following that injury, his long-time treating physician added a diagnosis of facet syndrome. Claimant then required a radio-frequency ablation that had never previously been recommended or required.

I acknowledge defendants' argument that claimant had degenerative disc disease. However, he was asymptomatic before the 2004 injury date. Thereafter, he has had low back and leg symptoms and required ongoing treatment. That condition was worsened and a new diagnosis was instituted after the February 19, 2015 injury. I find that claimant has proven by a preponderance of the evidence that he sustained a substantial aggravation of his underlying condition on February 19, 2015 and that he sustained eight percent permanent impairment as a result of the February 19, 2015 injury.

I find that Mr. Frakes has proven he sustained permanent disability as a result of the February 19, 2015 injury. He has required more invasive care than prior to that date, including the radio-frequency ablation. He has quit taking as many loads as he is scheduled to take. He has declined to bid into longer, more lucrative runs for Yellow Freight.

On the other hand, Mr. Frakes has no objective, significant changes in his MRI since 2015. He is not under formal, medical restrictions. He continues to work as an over-the-road truck driver for Yellow Freight. He conceded he could return to his only other former job as a respiratory therapist. His actual earnings likely have decreased since February 2015. However, Mr. Frakes has only proven a modest loss of future earning capacity as a result of the February 19, 2015 work injury.

Considering Mr. Frakes' age, educational background, employment history, ability to return to work, permanent impairment, lack of permanent medical restrictions, his motivation to continue working, the situs and severity of his injury, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Frakes has proven a 25 percent loss of earning capacity directly attributable to the February 19, 2015 work injury.

Defendants' payment records demonstrate that Mr. Frakes was paid temporary total disability benefits commencing on April 29, 2015. No weekly benefits were paid between February 20, 2015 and April 29, 2015. (Defendants' Ex. D & E) No healing period benefits are claimed for this period of time. (Hearing Report) I find that Mr. Frakes achieved maximum medical improvement following the February 19, 2015 work injury in October 2015. (Joint Ex. 7, p. 122)

Defendants also challenge claimant's entitlement to medical benefits. I find that the medical expenses claimant has incurred since February 19, 2015 for medications and epidural injections are causally related to the 2004 injury date. The required radio frequency ablation is specifically related to the February 19, 2015 work injury. (Joint Ex. 7, p. 118) In either event, all medical expenses submitted are causally related to one of the alleged injuries and should be paid by defendants. Claimant requires ongoing future medical care, including medication management, future prescriptions, epidural steroid injections, and potentially repeat radio-frequency ablations.

Mr. Frakes asserts a claim for reimbursement of an independent medical evaluation in File No. 5063146. Defendants obtained an independent medical evaluation performed by Dr. Fevurly on April 18, 2017. Dr. Fervurly offered an opinion about whether claimant sustained a permanent impairment as a result of the February 19, 2015 work injury. (Defendants' Ex. C, p. 9) Claimant subsequently obtained an evaluation with Dr. Bansal on August 31, 2018, which also addressed permanent impairment.

Dr. Bansal charged $2,587.00 for his independent medical evaluation. Defendants stipulate that claimant paid this as a disputed cost. Defendants offer no evidence or challenge that this fee is unreasonable and stipulated on the hearing report that the fees and charges of providers were reasonable. Dr. Bansal's evaluation fee is comparable to other fees I have observed for similar services. I find that Dr. Bansal's independent medical evaluation fee is reasonable under the circumstances of this case.

CONCLUSIONS OF LAW

The initial dispute submitted by the parties is whether claimant has demonstrated a change in condition from the time of the parties' agreement for settlement and whether claimant should be awarded additional permanent disability for the September 19, 2004 injury date. Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96

N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In this case, I found that claimant has not proven a substantial change in condition related to the September 19, 2004 injury date. Claimant's medical care remained relatively stable. He proved no change in medical restrictions or permanent impairment. Claimant remained in the same job with no actual, proven loss of earnings between the 2004 injury date and a subsequent February 2015 injury date. Claimant's symptoms waxed and waned during this period, but he did not prove a substantial change in condition that warrants an increase in his industrial disability award for the September 19, 2004 injury date. Therefore, I conclude that claimant's petition for review-reopening fails and that he should not receive an award of any additional permanent disability benefits.

Mr. Frakes asserts a second claim for a new injury on February 19, 2015. The employer stipulated that claimant sustained a work injury on that date. (Hearing Report) However, the employer disputed whether the February 19, 2015 injury caused permanent disability and the extent of any such entitlement. (Hearing Report)

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

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In File No. 5063146, I found that Mr. Frakes proved a substantial aggravation of underlying conditions. I found that claimant proved he had a new diagnosis added after the February 19, 2015 injury and that his condition worsened. I found that Mr. Frakes proved he sustained permanent impairment and resulting permanent disability. Therefore, I conclude that claimant is entitled to an award of permanent disability in some amount.

The Iowa Supreme Court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

Mr. Frakes sustained a low back injury, which is an unscheduled injury pursuant to Iowa Code section 85.34(2)(u). The parties appropriately stipulate that this injury should be compensated with industrial disability. (Hearing Report)

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.

Having considered claimant's age, educational background, employment history, ability to return work, his motivation to continue working, the situs and severity of his injury, his permanent impairment, loss of income since the February 19, 2015 work injury, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I found that Mr. Frakes has proven a 25 percent loss of future earning capacity as a result of the February 19, 2015 work injury. A 25 percent loss of earning capacity is equivalent to a 25 percent industrial disability and entitles claimant to an award of 125 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Defendants paid no healing period benefits to claimant as of February 20, 2015, and claimant requests none be awarded. Given that no healing period benefits were owed, I conclude that permanent partial disability benefits should commence on February 20, 2015. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Mr. Frakes also asserted a request for payment or satisfaction of past 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's medical expenses were found related to either the 2004 injury date or the 2015 injury date. Defendants are responsible for payment, reimbursement, or satisfaction of all past medical expenses introduced by claimant at Claimant's Exhibit 6. Defendants will be ordered to hold claimant harmless for these expenses.

Claimant also asserted a claim for alternate medical care. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience

> to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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

Claimant did not request a specific medical provider to continue future medical care. Having proven that his current and ongoing symptoms and treatment are causally related to either the 2004 or 2015 injury dates, claimant remains entitled to ongoing and future medical care, including but not limited to prescription medications, radio-frequency ablations, and epidural steroid injections. It makes sense that claimant should continue such treatment with Dr. Fotopoulos given that the physician has maintained and managed claimant's symptoms for nearly 15 years and maintained claimant's ability to work.

Defendants denied liability for further care. Therefore, they lost the ability to select the authorized medical provider or direct care. Therefore, I conclude it is reasonable to enter an order directing that Dr. Fotopoulos be the authorized medical provider moving forward.

Mr. Frakes seeks an order requiring reimbursement of Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39. 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). 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).

Having found that defendants obtained an impairment rating in 2017 and claimant's evaluation with Dr. Bansal occurred in 2018, I conclude that claimant has met the prerequisites of Iowa Code section 85.39. Having found that Dr. Bansal's fee was reasonable under the circumstances of this case, I conclude that claimant has

established entitlement to reimbursement of Dr. Bansal's fee. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Finally, Mr. Frakes requests costs be assessed against defendants. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant has not prevailed in File No. 5020033. I conclude that all parties should pay their own costs in File No. 5020033.

Claimant has prevailed and received a permanent disability award in File No. 5063146. I conclude that it is appropriate to assess costs in some amount.

First, claimant seeks assessment of his independent medical evaluation fee from Dr. Bansal. Having already awarded that pursuant to Iowa Code section 85.39, I conclude it is not properly assessed as a cost. Claimant seeks costs from Weyant Reporting. Presumably, this is for claimant's deposition. I conclude this is not a cost that should be assessed.

Mr. Frakes also seeks the cost of a report from Dickson-Diveley. The invoice for this report is not included in the record. I am not clear if this charge was solely for the drafting of a report or for a conference with counsel as well. At any rate, I conclude this is not an appropriately taxed cost under the circumstances.

Therefore, I conclude that claimant's filing fee ($100.00) in File No. 5063146 is the only cost that should be assessed in this case.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on February 20, 2015.

All weekly benefits shall be paid at the stipulated rate of five hundred twenty-six and 93/100 dollars ($526.93) per week.

The employer and insurance carrier 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 receive credit for all weekly benefits paid to date.

Defendants shall pay, reimburse claimant or any third-party payor, and shall hold claimant harmless for all medical expenses introduced at Claimant's Exhibit 6.

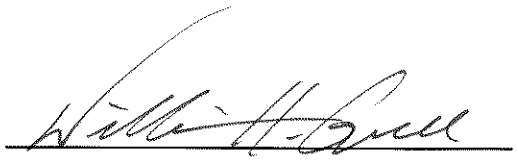
Dr. Fotopoulos shall be the authorized medical provider moving forward. Defendants shall authorize and pay for all causally related future medical care for claimant's low back, as provided by, recommended, or directed by Dr. Fotopoulos.

All parties shall bear their own costs in File No. 5020033.

Defendants shall reimburse claimant one hundred dollars ($100.00) in costs in File No. 5063146.

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 15th day of February, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

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.