BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMIE DAVIS, Claimant, vs. GORDON FOOD SERVICE, INC., Employer, and STANDARD FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1652763.01 ARBITRATION DECISION Head Note Nos.: 1402.20, 1403.30, 1601

Claimant Jamie Davis filed a petition in arbitration on June 29, 2020, alleging he sustained injuries to his back and body as a whole, while working for Defendant Gordon Food Services Inc. ("Gordon Foods") on August 23, 2018. Gordon Foods and its insurer, Defendant Standard Fire Insurance Company ("Standard Fire") filed an answer on August 4, 2020.

An arbitration hearing was held *via* CourtCall video conference on August 2, 2021. Attorney Jake Oeth represented Davis. Davis appeared and testified. Attorney Lori Scardina Utsinger represented Gordon Foods and Standard Fire. Bob Bonea appeared and testified on behalf of Gordon Foods and Standard Fire. Joint Exhibits ("JE") 1 through 4, Exhibits 1 through 6, and A through D, and F through I were admitted into the record. The record was held open through September 13, 2021, for the receipt of post-hearing briefs. The briefs were received. I reserved ruling on Exhibit E, which I admitted to the record on September 21, 2021. At that time the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Gordon Foods and Standard Fire raised the affirmative defense of intoxication under Iowa Code section 85.16(2) and waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. The alleged injury is a cause of temporary disability during a period of recovery.

3. Temporary benefits are no longer in dispute.

4. If the alleged injury is found to be a cause of permanent disability, the disability is an industrial disability.

5. The commencement date for permanent partial disability benefits, if any are awarded, is August 23, 2019.

6. At the time of the alleged injury Davis's gross earnings were $1,143.71 per week, he was single and entitled to two exemptions, and the parties believe the weekly rate is $686.28.

7. Medical benefits are no longer in dispute.

8. Credits are no longer in dispute.

9. Costs have been paid.

ISSUES

1. Whether Davis sustained an injury, which arose out of and in the course of his employment with Gordon Foods.

2. Whether the issue of permanency is ripe.

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is a cause of permanent disability, what is the nature and extent of disability?

5. Should costs be assessed against either party?

FINDINGS OF FACT

Davis lives in Marshalltown with his wife. (Transcript, page 12) Davis attended school through the 9th grade. (Ex. D, p. 30) He dropped out of high school to work when his baby was born. (Tr., p. 13) Davis earned a GED later when he was incarcerated. (Ex. D, p. 30; Tr., pp. 13, 17) At the time of the hearing he was 49. (Tr., pp. 12, 53)

Davis has experience working in roofing, meat packing, heating and cooling, upholstery work, motorcycle repair, masonry, and tire building. (Tr., pp. 13-19; Exs. A, pp. 5-6; B, p. 10; 3, p. 13; D, p. 31; 3, p. 13) From November 5, 2003 through September 28, 2016, Davis was incarcerated in a federal penitentiary in Colorado. (Tr., p. 17; Exs. A, p. 6; B, p. 10; 3, p. 13)

In 2018, Davis completed a truck driving course at DMACC and obtained a Class A CDL. (Tr., p. 23Exs. A, p. 4; D, p. 30) At the time of the hearing Davis held a Class A CDL that is valid until August 2025. (Ex. B, p. 11) Davis has certifications for Haz-Mat, tankers, doubles, and air brakes. (Tr., pp. 52, 54)

Gordon Foods hired Davis as a chain delivery driver on February 21, 2018. (Tr., pp. 23, 83; Exs. A, p. 1; C, p. 26) Davis started his week on Sunday at midnight. (Tr., p. 24) Davis would conduct a pretrip to ensure the truck was safe and in working order, take his paperwork to the office, and leave Des Moines between 12:15 and 12:30 a.m. and drive to Sioux City. (Tr., p. 24) Davis's first stop was at Mercy Hospital where he would unload dry food on the top dock, and then he would go down to the bottom dock to unload the freezer section with a hand cart. (Tr., p. 25) Davis used the hand cart to move 200 to 300 pounds of food up eight steps. (Tr., p. 25) Davis made additional stops at a college and restaurant before going to a hotel in South Dakota for the night. (Tr., pp. 27-28) The next day Davis would deliver food to a restaurant in Sioux City and drive back to Des Moines. (Tr., p. 28) He would have Wednesday off and perform the same route the next two days. (Tr., p. 28)

On Thursday, August 23, 2018, Davis left Des Moines after midnight for Sioux City. (Tr., p. 29) When he arrived at Mercy Hospital Davis unloaded the dry goods and then he backed the truck down to the freezer dock. (Tr., p. 30) Davis reported while taking one of many loads in, "as I'm coming –going up the steps, I get to the very top step, I take a last step and go to turn to pull the cart up the last step, and I drop to the ground," when his back gave out. (Tr., p. 31) Davis testified he could not get up and it was 35 to 40 minutes before someone found him outside on the Mercy dock near the freezers. (Tr., pp. 31-32) Two Mercy cafeteria employees found Davis and helped him to his truck. (Tr., p. 32)

Davis called his boss, Bonea, and told him he was injured. (Tr., p. 32) Bonea instructed Davis to call a 1-800 number for treatment and told him someone would come to finish his route. (Tr., pp. 34, 88) Bonea only spoke with Davis over the phone the date of the incident. (Tr., p. 89)

Davis called a cab and went to a Mercy Business Health Services in Sioux City, complaining of back pain. (Tr., p. 33) No one from Gordon Foods accompanied him. (Tr., pp. 66-67, 91) Rodney Cassens, M.D., examined Davis, ordered imaging, assessed Davis with an acute lumbar strain, administered a Toradol injection, and advised Davis to get out of the truck every 30 minutes while driving home to Des Moines. (Ex. 4, p. 18; JE 2)

The clinic staff in Sioux City collected a sample of Davis's urine for drug testing. (Tr., p. 67; Ex. 4) Davis signed a consent form for the drug testing at the clinic, agreeing his specimen had not been tampered with or altered and that the specimen was sealed in his presence. (Tr., pp. 67-68) No one from Gordon Foods was present when he underwent the testing. (Tr., p. 67) Bonea testified when a driver is hurt at work, the driver is drug tested. (Tr., p. 91) Bonea relayed Gordon Foods normally

sends drivers for random drug testing and preemployment testing at a facility in Des Moines. (Tr., pp. 91-92) Bonea had never been to the Mercy facility in Sioux City where Davis received the testing. (Tr., p. 91)

Bonea testified he drove a van to Sioux City and arrived before Davis returned from the clinic. (Tr., p. 89) Bonea took the truck and finished Davis's route on Thursday and Friday. (Tr., pp. 90-91) Bonea left before Davis returned from the Mercy clinic.

After he was through being examined, Davis called a cab and the cab driver drove him back to Mercy Hospital. (Tr., p. 33) When Davis returned to Mercy Hospital he drove the van home. (Tr., p. 89) Davis testified he had to sit in an awkward position while driving because he was injured and that he had difficulty keeping the vehicle straight. (Tr., p. 35)

Davis had complained of back pain prior to the August 2018 incident. On March 7, 2018, Davis attended an appointment with Joseph McGargill, M.D., complaining of lower back pain that started two days before with no known injury, and reporting he had chronic back pain that had become worse with the heavy lifting he does for work. (JE 4, p. 18) Dr. McGargill assessed Davis with lower back pain, and prescribed cyclobenzaprine, meloxicam, and prednisone. (JE 4, p. 19)

During cross-examination Davis admitted he had discussions about having a muscle spasm in his lower back before 2018 when he was in prison. (Tr., pp. 60-61) Davis relayed the surgeon told him he had fatty tissue that was pushing up against his spine and causing him to have a sciatic nerve problem. (Tr., pp. 60-61)

On August 29, 2018, Davis attended an appointment with Concentra in Des Moines, reporting he had hurt his lower back on August 24, 2018. (JE 1, p. 1) Carlos Moe, D.O., examined Davis, assessed him with acute midline low back pain with left-sided sciatica, an old compression fracture of the thoracic vertebra, and degenerative arthritis of the lumbar spine. (JE 1, pp. 1-2) Dr. Moe ordered physical therapy, prescribed methylpredinisolone, and imposed restrictions of no lifting, pushing, or pulling over 25 pounds. (JE 1, pp. 2-3)

Bonea testified Davis was off work Friday and Saturday, and for the entire next week. (Tr., p. 94) Bonea relayed Davis came back to work on a Sunday with a 25-pound weight restriction. (Tr., p. 94) Bonea did not have any extra workers, so he planned to go on the route with Davis, but when Davis came in he told Bonea his side was hurting and that he was in pain and Bonea told him he did not want him to come to work if he was in pain. (Tr., pp. 94-96) Davis reported he told Bonea he could barely walk. (Tr., pp. 36, 38) Davis relayed while he was conducting the pretrip he had difficulty getting under the truck, he got stuck under the truck and Bonea became angry with him and asked him to leave. (Tr., pp. 38-39) Bonea admitted he was frustrated with the situation because Davis showed up late for work and noted if Davis had called him to tell him he was in pain before coming to work he would have told him not to come

in. (Tr., p. 96) The last day Davis worked for Gordon Foods was August 30, 2018. (Ex. A, p. 8)

Davis's urine specimen collected in Sioux City was sent for processing. On September 4, 2018, University Services MRO Toxicology Services Group issued a report, stating the reason for the test was "POST ACCIDENT." (JE 3, p. 16; Ex. 4, p. 16) The report, signed by Jerome Cooper, D.O., states that the test was positive for methamphetamine. (JE 3, p. 16; Ex. 4, p. 16)

When questioned whether he was surprised the drug test came back positive for methamphetamine, Davis responded "[y]es and no." (Tr., p. 64) Davis relayed "[y]es because I had done it four – three, four days prior to it; and no because I had done it and it takes four to five days to get out of your system." (Tr., pp. 64-65) Davis disclosed the results of his drug test to his federal probation officer and testified he was sent to prison for four months because of the positive drug test. (Tr., p. 69)

Davis testified he has had problems with methamphetamine use in the past and that he spent time in prison related to drug issues. (Tr., p. 40) Davis acknowledged he used methamphetamine the weekend before the accident, but denied using methamphetamine for the 17 years before that weekend. (Tr., pp. 40, 42) Davis reported after he was released from prison he was placed on probation for 10 years and that he is required to provide urine specimens as part of his probation. (Tr., pp. 42-43) At the time of the hearing Davis was still on probation. (Tr., p. 43)

Davis testified a methamphetamine high lasts between six and eight hours and when he uses methamphetamine he is irritable, his equilibrium is off, his balance is off, he fidgets and has hand movements, and he cannot control his hands or legs. (Tr., p. 40) Davis reported methamphetamine causes him to act like he is drunk, he is unable to control himself, and it effects his decision-making. (Tr., pp. 41, 63) Davis denied being high on methamphetamine the day of the accident. (Tr., p. 41) Davis testified none of the workers from Mercy Hospital or the cab driver said anything to him about being high or drunk. (Tr., p. 42)

Gordon Foods terminated Davis's employment for a failed drug screen. (Ex. A, p. 8)

On September 5, 2021, Davis returned to Dr. Moe, complaining of low back pain. (JE 1, p. 6) Dr. Moe examined Davis, prescribed acetaminophen-codeine, and methocarbamol, and imposed restrictions of sitting and desk work only, with no driving due to medications prescribed. (JE 1, p. 7)

Davis testified he found work about four and a half months later with Lefebvre Trucking, performing heavy haul work. (Tr., pp. 43, 70) Davis reported his back was "horrifying, to say the least," and he left the job because he was having to throw chains and tie down or chain down the loads with five to 10, 20-pound chains and that the work

was too much for him. (Tr., pp. 43-44) Davis worked for Lefebvre Trucking full-time, with regular overtime, for about nine months. (Tr., pp. 44, 70)

Mid-State Milling Feed Company hired Davis to drive feed for a hog confinement. (Tr., p. 45) A machine loaded the feed, Davis would drive the truck to a hog confinement, walk over to the grain bin, open the lid, and use a remote control to empty the feed into the bin. (Tr., pp. 45-46) Davis reported the job was a lot easier. (Tr., pp. 45-46) Davis worked full-time, with regular overtime. (Tr., p. 71) Davis did not report for a urinalysis in March 2020, and he spent four months in the Polk County Jail. (Tr., pp. 46-47) After he was released Davis returned to Mid-State Milling Feed Company. (Tr., p. 47)

Three months before the hearing Davis left Mid-State Milling Feed Company to work for Staff Smart at Pitney Bowes, driving a truck, due to a pay increase. (Tr., p. 47) Davis passed a physical as part of the hiring process. (Tr., p. 54) Davis was not responsible for loading or unloading the truck and drove loads between Des Moines and Minneapolis. (Tr., pp. 48-49) After starting the position, Davis learned his pay would decrease after he completed the probationary period. (Tr., p. 48)

The week before the hearing Casey's hired Davis to work full-time driving fuel trucks, earning $30.00 per hour. (Tr., pp. 49-50, 73-74) Davis fills the truck full of gas and takes it to the gas station. (Tr., p. 49) Davis has to pull out hoses weighing between 25 and 50 pounds and valves weighing 20 to 25 pounds, hook the hoses and valves together to the truck and to the tanks, and empty the fuel. (Tr., pp. 49-50) Davis passed a physical exam for Casey's a few weeks before the hearing. (Tr., p. 54)

Gordon Foods has a drug testing policy that is contained in the employee handbook. (Tr., pp. 92-93; Ex. H) When an employee is hired, the employee receives a copy of the employee handbook containing the drug testing policy. (Tr., p. 92) The policy provides for random testing, Department of Transportation required testing, and post-incident testing, and testing of all job applicants. (Ex. H, pp. 44-45) The policy provides the employee is required to provide written consent prior to the testing, which is conducted by an independent testing facility. (Ex. H, p. 45) Under the policy, an employee suspected of working under the influence of illegal drugs or alcohol is suspended without pay until Gordon Foods receives the results of the drug and alcohol test from the testing facility and any other information Gordon Foods may require to make an appropriate determination. (Ex. H, p. 45) The policy further provides that an employee who tests positive will be subject to discipline, up to, and including immediate termination. (Ex. H, p. 45)

On September 13, 2018, the representative for Gordon Foods and Standard Fire sent Davis a letter stating his workers' compensation claim was being denied under Iowa law, noting:

> [i]f the employer shows that, at the time of the injury or immediately following the injury, the employee had positive test results reflecting the

> presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was not prescribed by an authorized medical practitioner or was not use in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury. The burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

(Ex. C, p. 24)

On October 15, 2020, Dr. Cooper signed a letter, prepared by counsel for Gordon Foods and Standard Fire, agreeing with the following to a reasonable degree of medical certainty:

1. As indicated in the report, Mr. Davis tested positive for methamphetamines.

2. While there was an indication by Mr. Davis that he was on Adderall, that would not play a role the positive test result for methamphetamine. Adderall is simply only an amphetamine and not a methamphetamine.

3. The way the drug testing was done in regards to isomers, would eliminate the potential for false positives for things such as inhalers or medications for other diseases like Parkinson's.

4. There are no current prescriptions for methamphetamines with the exception of very limited diet pills, including foreign diet pills.

5. Methamphetamine is quickly metabolized, which would include 5 days or less. Methamphetamine does not stay in urine very long.

6. Methamphetamine can cause hallucinations, hyper activity, and confusion.

7. You have no concerns in regards to the collection methods or chain of custody in regards to Mr. Davis's urine sample.

8. This was a single collection which was not split, the temperature was at normal ranges, and Mr. Davis's signature was provided along with the collection sample.

9. Your opinion remains that this was a valid drug test.

(Ex. E, pp. 35-36)

Robin Sassman, D.O., an occupational medicine physician, performed an independent medical examination for Davis on June 7, 2021, and issued her report on June 22, 2021. (Ex. 2) Dr. Sassman did not provide an opinion regarding intoxication. (Ex. 2) Dr. Sassman only provided an opinion concerning Davis's alleged back injury. (Ex. 2) Dr. Sassman recommended additional treatment. Davis testified he was not interested in additional treatment. (Tr., p. 75)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of the intoxication defense, nature and extent of disability, and entitlement to costs under Iowa Code sections 85.16, 85.34 and 86.40. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving the intoxication defense and extent of disability under Iowa Code sections 85.16 and 85.34 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Exhibit E

At hearing Davis averred Exhibit E, Dr. Cooper's report, is inadmissible because Gordon Foods violated his right to a confirmatory test under Iowa Code section 730.5(7) when they failed to split the urine sample. Gordon Foods and Standard Fire aver Exhibit E is admissible and that Iowa Code section 85.16 is controlling in this case and not Iowa Code section 730.5(7).

The trier of fact exercises his or her discretion in determining the admissibility of expert reports. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa 2003). "An abuse of discretion occurs when a ruling rests on grounds or reasons clearly untenable or unreasonable." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). Exclusion of evidence is the most severe sanction under the Iowa Rules of Civil

Procedure concerning expert discovery "and is justified only when prejudice would result." Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997).

Iowa Code section 85.16, governs willful injury and intoxication in workers' compensation cases. Iowa Code section 85.16 does not mention Iowa Code section 730.5, or the requirements of the section for employee drug and alcohol testing. Iowa Code section 85.16 applies to all employers, both public and private. Iowa Code section 730.5 governs drug and alcohol testing in the "private sector." Certainly, when the Iowa Legislature modified Iowa Code section 85.16 in 2017, it was aware of Iowa Code section 730.5 and chose not to include the drug and alcohol testing requirements of that section to be applied to workers' compensation cases.

Davis relies on two unemployment cases, where private sector employers violated the drug testing statute. Eaton v. Iowa Emp't App. Bd., 602 N.W.2d 553 (Iowa 1999); Harrison v. Iowa Emp't App. Bd., 659 N.W.2d 581 (Iowa 2003). In Eaton, the Iowa Supreme Court held John Deere's testing violated Iowa Code section 730.5(2) and did not meet the probable cause requirement of Iowa Code section 730.5(3), and found the agency erred in ruling that John Deere established misconduct based on Eaton's positive drug test. 602 N.W.2d at 557-58. In Harrison, the Iowa Supreme Court held Victor Plastics did not substantially comply with the requirements of Iowa Code section 730.5, and the agency erred in relying on the results of Harrison's drug test in deciding he was not entitled to unemployment benefits. 659 N.W.2d at 587-88. Both cases were decided before the 2017 amendments to Iowa Code chapter 85. Again, the Iowa Legislature would have been aware of these cases when it enacted changes to Iowa Code section 85.16. I do not find either case controlling in this workers' compensation case.

Davis did not present any expert testimony challenging the validity of Dr. Cooper's opinion. I find Dr. Cooper's opinion, Exhibit E, relevant, probative, and admissible. Exhibit E is admitted.

III. Intoxication Defense

Under Iowa Code section 85.16:

> No compensation under this chapter shall be allowed for an injury caused:
>
> 1. By the employee's willful intent to injure the employee's self or to willfully injure another.
>
> 2. *a.* By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

> *b.* For the purpose of disallowing compensation under this subsection, both of the following apply:
>
> (1) If the employer shows that, at the time of the injury or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was not prescribed by an authorized medical practitioner or was not used in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
>
> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

Davis submitted to drug testing in Sioux City shortly after the incident on August 23, 2018. Davis signed a consent form for the drug testing, agreeing his specimen had not been tampered with or altered and that the specimen was sealed in his presence. (Tr., pp. 67-68) The test results were positive for methamphetamine, a drug that was not prescribed by an authorized medical practitioner. (JE 3, p. 16; Ex. 4, p. 16) When questioned whether he was surprised the drug test came back positive for methamphetamine, Davis responded "[y]es and no." (Tr., p. 64) Davis relayed, "[y]es because I had done it four – three, four days prior to it; and no because I had done it and it takes four to five days to get out of your system." (Tr., pp. 64-65) Davis disclosed the results of his drug test to his federal probation officer and testified he was sent to prison for four months because of the positive drug test. (Tr., p. 69) As a result of the test, under the statute, it is presumed Davis was intoxicated at the time of the injury and that the intoxication was a substantial factor in causing the injury.

Under the statute, the burden shifts to the employee to prove the employee was not intoxicated at the time of the injury or that the intoxication was a substantial factor in causing the injury. Toler v. Midwest Cornerstone Prop. Mgmt., File No. 5066128, 2020 WL 5235794 (Iowa Workers' Comp. Comm'n June 15, 2020). Davis avers he was not intoxicated at the time of his injury and that he has overcome the presumption. No one was present at the time Davis was injured. Bonea did not physically see Davis on the date of his injury. And while Davis drove the company van back to Des Moines without incident, the fact he did so does not prove he was not intoxicated. Davis presented self-serving testimony that he was not intoxicated. He presented no expert report, expert testimony, or published studies supporting his self-serving testimony. He did not call any witnesses at hearing who observed him on the date of the accident. I do not find Davis has overcome the presumption. Given this finding, the remaining issues in this case are moot.

IV. Waiver of Penalty Issue by Failing to Raise Penalty on the Hearing Report

While the issue of penalty is moot given my above finding, Gordon Foods and Standard Fire also aver penalty is not a proper issue because Davis did not raise the issue of penalty until he filed his post-hearing brief.

When Davis filed the petition, he did not raise the issue of penalty. Davis did not raise the issue of penalty on the Hearing Report at the start of the hearing. I asked both parties whether there were any additional issues to be decided. Davis did not raise the issue of penalty at that time or before the conclusion of the hearing. When he filed his post-hearing brief, Davis raised the issue of penalty. Davis did not raise the issue of penalty at any time before filing his brief.

Davis's attorney signed the Hearing Report, listing the stipulations and issues to be decided. He did not raise the issue of penalty until he filed his post-hearing brief. This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Davis waived his argument by signing the Hearing Report and by failing to raise the issue of penalty with the deputy commissioner at the start of the hearing. Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable").

V. Costs

Davis seeks to recover costs in this case. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certified shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. Davis was not successful in proving his case. I find the parties should be responsible for their own costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing in this case.

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

Signed and filed this 5th day of November, 2021.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jacob Oeth (via WCES)

Matthew Sahag (via WCES)

Lori Scardina Utsinger (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.