BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JACOB STOBER, Claimant, vs. DOLL DISTRIBUTING, LLC, Employer, and FIRST DAKOTA INDEMNITY CO., Insurance Carrier, Defendants.	File No. 1662751.02 ARBITRATION DECISION Headnotes: 1402.40; 1803; 2501; 2907; 3001

STATEMENT OF THE CASE

Jacob Stober, claimant, filed a petition for arbitration against Doll Distributing, LLC as the employer, and First Dakota Indemnity Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on March 20, 2023.

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 5, and Defendants' Exhibits A through K. Claimant testified on his own behalf. No other witnesses testified at trial. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted, and both parties filed briefs simultaneously on April 3, 2023. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the February 27, 2019 work injury caused permanent disability.

2. The extent of claimant's entitlement to permanent disability, if any.

3. The claimant's average gross weekly earnings and corresponding weekly worker's compensation rate.

4. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses, including medical mileage, contained in Claimant's Exhibit 3.

5. Whether costs should be assessed and, if so, in what amount.

FINDINGS OF FACT

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

Jacob Stober, claimant, is a 35-year-old man, who lives in DeSoto, Iowa. He graduated from high school in 2006, obtained a truck driving certificate from Indian Hills Community College, as well as an associate degree from Indian Hills in bio processing. Mr. Stober initially began his career working for Cargill in 2010. He worked in a refinery for Cargill, making corn syrup for use in food and beverages. He left that job because he was required to work rotating shifts and found it difficult and taxing, both physically and mentally.

Mr. Stober next worked for Mahaska Bottling filling vending machines at warehouses, offices, and other locations. He worked for Mahaska Bottling until he started his employment with Doll Distributing in January 2017.

Mr. Stober commenced his employment with Doll Distributing as a route driver. As a route driver for Doll Distributing, Mr. Stober worked 40 or more hours per week. He drove a semi and delivered beer and beverages to grocery stores, liquor stores, and convenience stores. He delivered cans, bottles, and kegs of beer to these various vendors.

Claimant's work duties at Doll Distributing required him to frequently lift cases of beer weighing 20-24 pounds. He also lifted and moved kegs of beer weighing between 60-185 pounds. He was required to lift these kegs above head level occasionally and operated a two-wheeler to transport the various products. Mr. Stober developed a cumulative injury in his low back that culminated in him reporting his ongoing back pain to the employer on February 27, 2019. The employer accepted Mr. Stober's work injury claim and provided him with medical care.

Initially, the employer sent claimant to David T. Berg, D.O. Dr. Berg evaluated Mr. Stober on March 6, 2019, documenting claimant's complaints of back pain extending into his right leg. Dr. Berg diagnosed a thoracic and lumbar strain but permitted claimant to return to work with restrictions. Mr. Stober returned for care on March 13, 2019, with

ongoing back complaints and radiculopathy into the right leg. Dr. Berg ordered an MRI be performed on claimant's low back.

The MRI performed on March 20, 2019 demonstrated a diffuse disc bulge at the L4-5 level, as well as moderately severe central spinal canal stenosis and a broad-based disc herniation at the same level. Following the MRI, Dr. Berg referred Mr. Stober to a back surgeon, Zachary G. Ries, M.D. Dr. Ries prescribed physical therapy for claimant. Unfortunately, the physical therapy was not helpful in resolving claimant's symptoms.

Dr. Ries recommended surgical intervention and performed a right L4-5 partial diskectomy decompression and L4-5 central decompression with bilateral nerve root decompression on May 7, 2019. Claimant testified that surgery relieved the majority of his symptoms. In August 2019, claimant received a call from Mahaska Bottling offering him a job opportunity.

Claimant accepted the job because it was lighter and physically easier to perform. In his new position with Mahaska Bottling, claimant works full-time, loads his own truck, drives to and from deliveries, and performs all physical work to unload items. Claimant lifts up to 30 pounds, performs stocking duties, cleaning duties, driving, and works alone. He concedes he is physically capable of performing all job duties at Mahaska Bottling. In fact, in his deposition, Mr. Stober conceded he still feels safe lifting up to 100 pounds and that he has no current medical work restrictions. (Defendants' Ex. D, p. 4)

Having obtained alternate employment, Mr. Stober terminated his employment with Doll Distributing in August 2019. However, claimant continues to maintain his commercial driver's license. He passed a DOT physical and renewed the license in September 2022.

Claimant remained under Dr. Ries' care through September 2019. On September 11, 2019, Dr. Ries documented that claimant was doing well and at maximum medical improvement. He noted claimant's job change to an easier position and noted that claimant reported he "is nearly back to baseline." Dr. Ries permitted claimant to return to work with no restrictions and follow-up only as needed.

Claimant sought an independent medical evaluation, performed by Mark C. Taylor, M.D. on March 3, 2020. Dr. Taylor confirmed the diagnosis of a herniated disc at L4-5 with a surgical discectomy and decompression. Dr. Taylor opines that Mr. Stober sustained a 12 percent permanent impairment of the whole person as a result of the February 17, 2019 injury and resulting surgery. (Claimant's Ex. 1, p. 3) Dr. Taylor further opined that claimant requires no restrictions in his current employment, but also recommended that claimant avoid lifting or carrying more than 40-50 pounds at or above knee level on an occasional basis. He also recommended that claimant alternate his sitting, standing, and walking as needed for comfort and limit any squatting, bending, kneeling, and crawling to an occasional basis. (Cl. Ex. 1, p. 3)

Mr. Stober continued full-time employment with Mahaska Bottling and required no medical care for his low back between September 2019 and March 2021. However, on March 29, 2021, Mr. Stober returned to Dr. Ries, reporting he developed recurrent right leg pain similar to what he experienced prior to surgery. Mr. Stober reported that the pain was getting severe, nearly as bad as it was preoperatively.

Dr. Ries ordered a repeat MRI, which was performed on April 1, 2021. The MRI demonstrated a central and right disc protrusion at the L4-5 level, which potentially distorted the left L4 nerve root. Mr. Stober returned to Dr. Ries on April 19, 2021, explaining that his symptoms returned around Christmas 2020. Dr. Ries interpreted the MRI as demonstrating a recurrent disc herniation and recommended attempting epidural lumbar injections but maintained claimant working without restrictions. Claimant also sought chiropractic care on his own.

Unfortunately, the injections provided only partial relief and claimant's symptoms returned. By February 9, 2022, the pain specialist documented that claimant was "doing well" with resolution of his radicular pain. (Joint Exhibit 6, p. 83) The pain specialist documented that claimant had no weakness in his legs and that his primary complaint was back spasms that were intermittent. The physician anticipated maximum medical improvement (MMI) in the near future, and subsequently declared MMI on March 24, 2022. (Jt. Ex. 6, p. 87)

Claimant testified that he requested additional care after March 24, 2022. However, he testified that defendants denied further care, arguing there was a break in the causal connection and that any ongoing symptoms are not related to the initial work injury. Indeed, defendants identify evidence within the medical records that suggest claimant may have sustained unrelated aggravations of his low back condition since September 2019.

For instance, defendants point an instance in which claimant experienced increased back pain after staining his deck in April 2019. (Jt. Ex. 3, p. 8) Defendants note that claimant worked at a golf tournament in June 2019, went fishing, and performed yardwork in June 2019. (Jt. Ex. 3, pp. 9-10) Defendants also note claimant went fishing and participated in a water balloon fight in July 2019. (Jt. Ex. 3, pp. 15-16)

Again, in 2021, defendants identify comments documented in claimant's medical records that suggest worsening of symptoms in his back. In July 2021, claimant reported to his physical therapist that he couldn't walk or move after playing golf the prior weekend. (Jt. Ex. 3, p. 19) A similar record from the pain specialist documents worsening after the golf tournament. (Jt. Ex. 6, p. 76) Defendants point to a chiropractic record on July 12, 2021, which notes that claimant had "recently gotten much[,] much worse." (Jt. Ex. 7, p. 88)

Defendants also point out that claimant's symptoms appear to "move" from his back to his hips in August and September 2021. Similarly, defendants note a record in

December 2021, in which claimant reportedly indicated that he had knee pain but reported no further radicular pain and noted that his "back hasn't had any issues." (Jt. Ex. 3, p. 53)

Defendants rely upon the above evidence and dispute whether the recurrent disc herniation is related to the initial work injury. Two back surgeons have offered causation opinions related to the recurrent disc herniation. Dr. Ries signed a summary letter from defense counsel on October 8, 2021, noting "it is difficult… to now state whether the recurrent herniation and current symptoms are a complication of the original injury or the result of a further injury or aggravation." (Def. Ex. B, p. 2) Claimant's counsel then sent correspondence to Dr. Ries, and Dr. Ries agreed, "recurrent disc herniation at L4-5 is a known complication or risk of the surgery. Therefore, I would say recurrent disc herniation is related to original surgery." (Cl. Ex. 2, p. 8)

Defense counsel then sent further correspondence to Dr. Ries. Dr. Ries provided a written response dated November 29, 2022, indicating that activities such as golfing and performing home repairs can cause an aggravation or further injury. He further confirmed that claimant "pulled something and had onset of symptoms in 2021 due to activities unrelated to his 2019 work accident that required he seek medical treatment." (Def. Ex. B, p. 5)

Claimant again sought clarification from Dr. Ries on the causation issue. Dr. Ries followed up in a subsequent report dated February 7, 2023, noting that claimant "had a recurrent disc herniation. The original herniation weakened his disc and made him more prone to reherniating (sic) the disc, for which he received treatment." (Cl. Ex. 2, p. 11) Dr. Ries further confirmed he knew of the "minor exacerbations" referred to by defendants but concluded that "the recurrent herniation was directly related to the February 27, 2019 work injury." (Cl. Ex. 2, p. 11) Dr. Ries opined that claimant sustained a 10 percent permanent impairment of the whole person as a result of his work injury. (Def. Ex. B, p. 1)

Defendants countered Dr. Ries' causation opinion by requesting a record review and causation opinion from Trevor R. Schmitz, M.D. Dr. Schmitz did not evaluate claimant, but did have medical records and claimant's MRI's available for review. He authored a January 5, 2023 report. Dr. Schmitz considers the original injury as well as potential subsequent aggravations. Interestingly, although defendants admitted the initial injury and provided medical and surgical treatment for that injury, Dr. Schmitz opines, "there is likely not significant evidence that his original disc herniation was related to work. Bending and lifting has not been shown to be associated with disc herniations." (Def. Ex. A, pp. 4-5)

Dr. Schmitz then proceeds to consider whether the subsequent incidents and redevelopment of symptoms are related to the original alleged work injury. Dr. Schmitz notes, "There is some question whether this L4-L5 level truly was reherniated (sic)." (Def. Ex. A, p. 5) Ultimately, Dr. Schmitz opines, "it appears as though Mr. Stover (sic) is participating in several events which are causing worsening low back pain including golfing and working on a smoker… There is no way one could relate his April 1, 2021,

MRI findings to his reported work injury." (Def. Ex. A, p. 6) Dr. Schmitz further opines, "There was not really an original work accident, but rather just reports of no specific incident or injury and rather a lot of bending and lifting, which again have never been shown to be a risk factor for a herniated disc.… Regardless, assuming that the original disc herniation was related to his February 27, 2019, incident, certainly, his continued symptoms are more likely related to his overweight status and outside activities including working around the house and playing golf, which are well documented in his records." (Def. Ex. A, p. 6)

Considering the opinions of Dr. Ries and Dr. Schmitz, I ultimately find the causation opinion of Dr. Ries to be more convincing and accurate. I acknowledge that Dr. Ries provided some potentially contradictory statements and conclusions. However, ultimately, after considering all of the evidence, Dr. Ries opines that the re-herniation is related to claimant's work injury. I accept that opinion as accurate.

Dr. Ries had the benefit of performing surgery on claimant. He saw claimant multiple times both before and after the alleged aggravations occurred. He is in an advantageous position to assess the cause of claimant's ongoing low back condition.

By way of contrast, Dr. Schmitz has not examined claimant. He must rely upon the medical records of Dr. Schmitz and other providers to formulate his opinions. Dr. Schmitz's opinions appear to contradict defendants' own position and admission that the initial injury was work related. In fact, defendants admit that claimant sustained a work injury in the hearing report. Dr. Ries specifically diagnosed and surgically treated a herniated disc following that work injury. Similarly, I find Dr. Schmitz's opinion that there may not be a re-herniation to be inaccurate and find Dr. Ries' opinion to be most accurate on this point.

While I acknowledge the medical records document some increase in symptoms after non-work-related activities, I ultimately accept Dr. Ries' opinion that claimant sustained a work-related injury. I reject Dr. Schmitz's opinion that the lifting and bending at work cannot be proven to be the cause of claimant's disc herniation. Rather, I specifically find that claimant's work activities resulted in the February 27, 2019 work injury (a fact to which defendants stipulate in the hearing report) and that the work injury resulted in a disc herniation requiring surgical intervention by Dr. Ries. I further accept Dr. Ries' explanation that the original disc herniation rendered claimant prone to re-herniation and that the current condition is directly related to the original work injury. Therefore, I find that claimant proved his ongoing condition is causally related to the February 27, 2019 work injury.

Having found that claimant's current condition is causally related to the underlying work injury, I note that two physicians have offered opinions about the permanent nature of the injury and claimant's condition. Dr. Ries opines that claimant has achieved maximum medical improvement and sustained a 10 percent permanent functional impairment of the whole person as a result of the injury and subsequent back surgery.

(Def. Ex. B, pp. 1, 5) Mr. Stober does not believe he carries any work restrictions and feels comfortable lifting up to 100 pounds.

Claimant also obtained an independent medical evaluation performed by Mark C. Taylor, M.D. on March 26, 202. Dr. Taylor opines that claimant sustained a 12 percent permanent functional impairment of the whole person as a result of his work injury. Dr. Taylor opines that claimant does not need restrictions for his subsequent employment. Yet, he also opines that claimant should comply with certain limitations outlined previously.

Ultimately, I accept the opinions of Dr. Ries as most credible and consistent with claimant's testimony and experience. Specifically, I find that claimant sustained a 10 percent permanent functional impairment. I find that he requires no specific permanent work restrictions and is capable of performing his current employment without restrictions. I do find Dr. Taylor's recommendations pertaining to future physical limitations to be reasonable, though not specially a permanent medical restriction. I find that claimant continues to experience some symptoms related to his initial work injury, but I accept Dr. Ries' opinion that these symptoms likely can be managed conservatively and non-operatively.

Mr. Ries is a relatively young worker. There is no reason to believe he is close to retirement and has many years left of anticipated work life. Claimant's injury was significant enough to require back surgery, though he has experienced a fairly good result. Claimant left his employment with Doll Distributing as a result of his low back injury and resulting symptoms. He now earns less than he did at the time of the work injury. Considering claimant's age, proximity to retirement, the severity and situs of his injury, as well as his permanent impairment, permanent restrictions, motivation, educational background, employment background, ability to return to gainful employment, as well as all other factors of industrial disability, I find that claimant proved a 20 percent loss of future earning capacity as a result of his February 27, 2019 low back injury at Doll Distributing.

Mr. Stober seeks an award of medical expenses for physical therapy charges contained in Claimant's Exhibit 3. Defendants dispute entitlement to those therapy charges, as well as causal connection, reasonableness, and necessity of that physical therapy. I find that the physical therapy reflected by the charges contained in Claimant's Exhibit 3 were the result of claimant's treating physician's recommendations, represented reasonable and necessary medical care for claimant's low back injury. I find that the physical therapy was causally related to the initial injury based on the opinions of Dr. Ries, as noted, and explained above.

The final disputed factual issue for resolution is claimant's gross average weekly wages immediately prior to the February 27, 2019 injury date. Claimant's post-hearing brief provides one paragraph of explanation or argument on this issue. Claimant's brief urges three unspecified pay periods of wages be excluded as not typical or representative of claimant's earnings and replaced in the calculation of gross weekly earnings.

Claimant introduced Claimant's Exhibit 4, which is claimant's rate calculation and some corresponding earnings statements. Claimant's Exhibit 4 appears to seek to exclude and replace four pay periods. There is no explanation why the claimant's rate calculation excludes four pay periods, but his brief only seeks to exclude three pay periods. Nor is there any explanation in claimant's post-hearing brief which of the four challenged pay periods is now conceded as accurate.

Defendants' post-hearing brief does not mention or provide any argument on the issue of gross average weekly earnings. Defendants introduced Defendants' Exhibit K, which provides a summary of defendants' calculation of the weekly rate with some earnings statements. No testimony was elicited relative to the gross weekly earnings that is enlightening.

Review of the parties' calculations and summaries demonstrates that defendants utilized the seven pay periods and earnings immediately prior to the injury date, representing the 14-weeks immediately preceding the injury date. (Def. Ex. K, p. 1) Claimant brief urges exclusion of three unspecified pay periods while his exhibit urges exclusion of the earnings for pay periods ending February 16, 2019, January 5, 2019, November 24, 2018, and November 10, 2018, and replaces those pay periods with the pay periods ending December 8, 2018, October 27, 2018, October 13, 2018, and September 29, 2018. (Cl. Ex. 4, p. 14)

The initial challenge is to the pay period ending February 16, 2019. According to claimant's own summary, that pay period includes 71.33 regular hours, 10.77 hours of overtime, 8 hours of paid time off (PTO), and 8 unpaid hours. No explanation is provided relative to the 8 hours of unpaid time or the reason for 8 hours of PTO utilized. However, claimant still worked more than 80 hours in that two-week period. Claimant provided no evidence to establish why there were unpaid hours, PTO, or how or why these earnings were not customary or typical for him.

The second pay period challenged or excluded in Claimant's Exhibit 4 is for the period ending January 5, 2019. During that period, claimant was paid for 76.71 hours of regular work and 16 hours of holiday pay (presumably for Christmas and New Year's). No explanation is provided why this is not a customary pay period or earnings for claimant. Yet, he is paid for more than 91 hours during this pay period.

The third challenged period is pay period ending November 24, 2018. Claimant's summary notes that claimant worked 67.7 regular hours, 9.57 overtime hours, took 4.45 hours of PTO, had 3.55 hours of unpaid time, and 8 hours of holiday pay (presumably Thanksgiving). Claimant was paid for more than 89 hours during this period. There is no explanation why claimant required PTO or why this pay period was unusual or not customary earnings for claimant.

The final pay period claimant challenges in Claimant's Exhibit 4 and seeks to exclude is November 10, 2018. During this pay period, claimant was paid for 80 regular hours of work, 8.51 hours of overtime, 3 hours of vacation, and 5 hours of paid time off.

Again, claimant offered no explanation why being paid for more than 96 hours of time was not customary for him or why he required vacation or PTO during this pay period.

Ultimately, claimant seeks to replace the challenged earnings with pay periods that provide slightly more hours of pay in the form of overtime. Again, there is no explanation if those pay periods were the result of customary work, exceptional overtime opportunities, or why any of the earnings were not customary or usual for claimant. I find that claimant has not proven any of the challenged (three or four pay periods) were not usual, typical, or customary earnings. I find that the defendants' rate summary and calculations are reasonable, usual, typical, and customary for claimant's pre-injury earnings. Therefore, I find that claimant's gross average weekly earnings prior to the February 27, 2019 injury date were $946.43. Pursuant to the parties' stipulations, claimant was married and entitled to three exemptions on the date of injury. (Hearing Report)

CONCLUSIONS OF LAW

The initial disputed issue in this case is whether the ongoing low back condition is causally related to the admitted February 27, 2019 work injury. 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).

In this case, I considered the competing medical opinions of Dr. Ries and Dr. Schmitz and ultimately found claimant proved his ongoing low back condition is causally related to the February 27, 2019 work injury. Therefore, I must consider the claim for permanent disability. Defendants dispute whether the injury caused permanent disability.

Having accepted the medical opinion offered by Dr. Ries, I found that claimant sustained a 10 percent permanent functional impairment of the whole person as a result of the work injury, and that claimant left his employment with Doll Distributing as a result of his injury and difficulties continuing to perform those job duties. I conclude claimant proved his injury resulted in permanent disability. The parties stipulate that any permanent disability should be compensated with industrial disability benefits. (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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

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

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. Pursuant to the 2017 statutory revision, I must also consider the number of years in the future it is reasonably anticipated claimant would continue to work at the time of his work injury. Iowa Code section 85.34(2)(v). Having considered all of the factors of industrial disability outlined by the statute and the Iowa Supreme Court, I found that claimant proved a 20 percent loss of future earning capacity. I conclude this is equivalent to a 20 percent industrial disability. Iowa Code section 85.34(2)(v).

Industrial disability benefits are compensated as a relative percentage of 500 weeks of benefits. Iowa Code section 85.34(2)(v). Therefore, a 20 percent industrial disability entitles claimant to an award of 100 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v). The parties stipulate that the permanent disability benefits should commence on September 11, 2019. (Hearing Report)

The next dispute submitted by the parties is the proper weekly rate at which benefits should be paid. Claimant asserts his gross average weekly wages prior to the injury date were $966.38. Defendants dispute this and assert that the gross average weekly wages were $946.43.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross

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

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In this case, defendants utilized claimant's earnings for the 14 weeks immediately prior to his injury date. Claimant concedes that 14 weeks should be utilized given that he was paid biweekly. However, claimant asserts that either three or four of the biweekly earnings immediately preceding his injury date do not fairly reflect his customary earnings. While his claim and challenge are not well-defined and the argument is confusing between his exhibit and his post-hearing brief, I considered claimant's challenge and whether the pay periods he challenged in his exhibit are fairly representative of his weekly earnings prior to the date of injury.

Ultimately, I found that there was not any good explanation why the variations in claimant's earnings were not customary or typical of his pre-injury earnings. Instead, I found that the weekly earnings utilized by defendants immediately preceding the injury date were customary, typical, and fairly represented claimant's earnings immediately preceding the injury date. Having reached that finding, I conclude that the calculations introduced by defendants at Defendants' Exhibit K, page 1 are accurate. I conclude claimant's average gross weekly earnings at the time of the injury were $946.43. Iowa Code section 85.36.

The parties stipulated that claimant was married and entitled to three exemptions on the date of injury. (Hearing Report) Utilizing the Commissioner's Ratebook spread sheet for the time period of July 1, 2018 through June 30, 2019, I conclude the applicable weekly worker's compensation rate for claimant's permanent partial disability award is $622.73.

Mr. Stober also asserts a claim for past medical expenses contained in Claimant's Exhibit 3. 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).

Having found that claimant's ongoing low back condition is causally related to the February 27, 2019 work injury, I similarly found that the physical therapy charges incurred and reflected in Claimant's Exhibit 3 were recommended by treating physicians and constituted reasonable and necessary medical treatment. Therefore, I conclude claimant established entitlement to payment, satisfaction, or reimbursement of all charges reflected in Claimant's Exhibit 3. Iowa Code section 85.27.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this instance, claimant has recovered permanent disability, as well as an award of past medical expenses. I conclude it is reasonable to assess claimant's costs, if otherwise permissible.

Claimant's Exhibit 5 contains claimant's request for costs. Specifically, claimant seeks assessment of his filing fee. This is a reasonable and permissible cost. 876 IAC 4.33(7). I assess claimant's expense for his filing fee in the amount of $100.30 against defendants.

Mr. Stober also seeks assessment of two charges from Dr. Ries. Specifically, claimant seeks assessment of a $150.00 charge from Dr. Ries on July 13, 2022. This charge is documented at Claimant's Exhibit 5, page 27. The physician's statement reflects this charge was specifically for a correspondence payment request.

Agency rule 876 IAC 4.33(6) permits assessment for "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." The Iowa Supreme Court held that the cost of the physician's report is a permissible cost under Rule 4.33(6) because it is offered in lieu of testimony. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015). I conclude the $150.00 charge reflected in Dr. Ries' July 13, 2022 statement (Cl. Ex. 5, p. 27) is a permissible cost and should be assessed against defendants. 876 IAC 4.33(6).

The final cost sought by claimant is a second charge from Dr. Ries. This charge is reflected in Claimant's Exhibit 5, page 28. That statement reflects the charge is for an "Attorney Conference Payment Request." The statement reflects the charge was for a 15-minute conference with the physician. While the conference may have later resulted in a written report being provided by the physician, the specific charge sought was to pay Dr. Ries for his time to meet with claimant's attorney. This is not a charge that is permitted under 876 IAC 4.33(6). I deny the request to assess the December 16, 2022 charge submitted by Dr. Ries. Therefore, in total, I assess claimant's costs against defendants totaling $250.30.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on September 11, 2019.

All weekly benefits shall be payable at the weekly rate of six hundred twenty-two and 73/100 dollars ($622.73) per week.

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest 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).

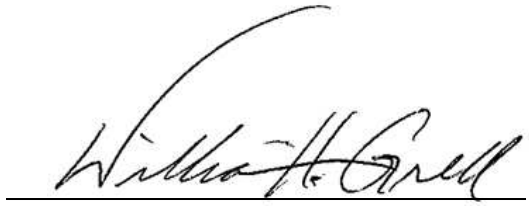
Defendants are entitled to the credit against these benefits as stipulated to in the hearing report.

Defendants shall pay any outstanding medical expenses, reimburse claimant or a third-party for any payments made, and shall otherwise indemnify and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 3.

Defendants shall reimburse claimant's costs totaling two hundred fifty and 30/100 dollars ($250.30).

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 24th day of August, 2023.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Caroline Westerhold (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, 10A) 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.