BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EARL PIERCE, Claimant, vs. EVERGREEN PACKAGING EQUIPMENT, INC., Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5068665 ARBITRATION DECISION Head Note Nos.: 1402.40, 1802, 1803, 2501, 2701, 2907, 3001, 3002, 3701

STATEMENT OF THE CASE

Earl Pierce, claimant, filed a petition for arbitration against Evergreen Packaging Equipment, Inc. (hereinafter referred to as "Evergreen") and its workers' compensation insurance carrier, Ace American Insurance Company. This case came before the undersigned for an arbitration hearing on October 29, 2020. The parties were unable to complete their presentation of the evidence during the three-hour timeslot they requested. Therefore, the hearing was suspended and reconvened to be completed on November 3, 2020. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing reports, 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 10, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through H. Claimant testified on his own behalf and called Hazel Pierce to testify. No other witnesses testified at trial.

As a result of an evidentiary objection, the evidentiary record was suspended for 30 days after the hearing to permit claimant to obtain additional evidence pertaining to the credentials of certain individuals offering medical opinions or analysis in a long-term disability application submitted as an exhibit at trial. Claimant did not request additional

time or file additional exhibits within the allotted time and the evidentiary record closed upon the expiration of the 30 days after 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 December 30, 2020. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the July 31, 2017 work injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary total disability, or healing period, benefits.

2. Whether the July 31, 2017 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability.

3. Whether claimant is an odd-lot employee.

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

5. The proper rate at which weekly benefits should be paid, including disputes pertaining to claimant's average gross weekly wages, marital status, and entitlement to exemptions.

6. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

7. Whether claimant is entitled to alternate medical care and specifically an order authorizing Thomas Paynter, M.D., for further medical treatment.

8. Whether costs 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:

Earl Pierce is a 68-year-old man who lives in Cedar Rapids. (Transcript, page 67) Mr. Pierce dropped out of high school, but obtained a GED. He attended some college, studying psychology and sociology. (Tr., p. 77) Mr. Pierce did not obtain a college degree and has never utilized his education in psychology or sociology in the work force. Nor has Mr. Pierce obtained any further education in approximately the last 45 years. (Tr., p. 78)

Mr. Pierce has worked construction jobs, including driving a dump truck, performing general pipeline construction, and working on highway construction crews operating large machinery. (Tr., pp. 78-80) For a couple of years beginning in approximately 1980, claimant built baking equipment and then moved into a manufacturing position fashioning fabrication equipment. (Tr., p. 80) From 1982 until 1988, claimant worked a manufacturing job operating high-speed rotary presses making grenades for the United States military. (Tr., p. 81)

In 1988, claimant began working for the current employer. He testified that he worked a test line job for two years for Evergreen, then transferred to the service department using the knowledge he acquired on the test line. Mr. Pierce worked in the service department from 1990 through the end of his employment with Evergreen on July 1, 2019. (Tr., pp. 82-83; Claimant's Ex. 5, p. 80)

Claimant described his project support technician job in the service department as a physical job that required him to occasionally lift up to 150 pounds, as well as working in awkward positions, crouching, kneeling, crawling, and working in small spaces. (Tr., pp. 84-85) Mr. Pierce testified that he could not perform all of the job functions of any of his prior positions with Evergreen or his jobs preceding his employment at Evergreen.

Mr. Pierce asserts he sustained a left hip injury while performing typical work duties for the employer on July 31, 2017. However, defendants accurately point out that claimant had prior left hip issues that are relevant to this case. In fact, Mr. Pierce sustained a left hip injury in 2011 as a result of a motor vehicle accident that occurred during his employment activities with Evergreen. (Joint Exhibit 1, p. 6)

Mr. Pierce sought medical care for his left hip symptoms after the 2011 motor vehicle accident. In fact, he sought orthopaedic evaluation and submitted to an MRI of the left hip. That MRI demonstrated no evidence of an acute injury to the left hip. (Joint Ex. 2, p. 29) Ultimately, Mr. Pierce testified that his left hip pain resolved after the 2011 motor vehicle accident. Indeed, there was a significant gap in treatment of the left hip between the 2011 accident and the subsequent July 31, 2017 work injury. I find claimant's testimony credible regarding the resolution of left hip symptoms after the 2011 accident and I accept it as accurate.

Defendants also point out that Mr. Pierce developed prostate cancer prior to the July 2017 work injury. Medical records document that claimant was given a diagnosis of prostate cancer by at least 2016. (Joint Ex. 7) Ultimately, the prostate cancer progressed and metastasized into claimant's left hip. (Joint Ex. 7, p. 116) At approximately the same time as this cancer progression, claimant's left hip pain increased. (Joint Ex. 7, p. 118)

Claimant's treating urologist, Thomas D. Richardson, M.D., noted the left hip pain in February 2018 "related to a work injury." (Joint Ex. 7, p. 118) As treatment for the prostate cancer was initiated and somewhat effective in at least leveling off any progression of the cancer, claimant's left hip symptoms appeared to somewhat alleviate

according to the medical records. Therefore, defendants contend that claimant's ongoing left hip condition and symptoms are related to his metastatic prostate cancer moving into claimant's left hip.

On July 31, 2017, Mr. Pierce was working remotely on a customer's site in Indiana. Specifically, claimant testified he was sitting on the floor with his legs spread. He testified he had to reach over a frame that was approximately chest level. He then attempted to lift a part that weighed approximately 25-30 pounds. Upon doing so, he experienced a sharp pain in his groin and left hip. Mr. Pierce testified that the pain was sufficient to make him scream when it occurred. (Tr., pp. 99-100)

Mr. Pierce testified that he stopped lifting the item and slid out from under the frame. When he attempted to move his left hip, he experienced significant pain. Claimant testified that he called his manager after his shift on July 31, 2017 and reported the injury. However, he believed that he simply pulled a muscle and did not ask for medical care at that time. (Tr., pp. 100-101)

Unfortunately, claimant's symptoms did not resolve. Instead, those symptoms progressively worsened. By October 2017, claimant contacted his manager and requested medical care. (Tr., p. 101) The employer authorized medical evaluation and Tina Stec, M.D., evaluated Mr. Pierce on October 11, 2017. (Joint Ex. 1, p. 24)

Dr. Stec recommended physical therapy, which did not prove effective for claimant's left hip pain. (Joint Ex. 1, pp. 25-26) Dr. Stec recommended light duty work beginning on October 11, 2017. (Joint Ex. 1, p. 25) Ultimately, Dr. Stec ordered an MRI arthrogram of claimant's left hip. (Joint Ex. 1, p. 27) Dr. Stec subsequently diagnosed claimant with degenerative changes and a torn labrum in his left hip. Dr. Stec referred Mr. Pierce to an orthopaedic surgeon for specialty care. (Joint Ex. 1, p. 28)

On December 8, 2017, Thomas B. Paynter, M.D., an orthopaedic surgeon, evaluated Mr. Pierce. He diagnosed claimant with a left hip labral tear with degenerative changes and a femoral neck lesion. Dr. Paynter recommended a left hip MRI. (Joint Ex. 6, p. 73)

Dr. Paynter was clearly aware of claimant's diagnosed metastatic prostate cancer and the fact that it invaded claimant's left femoral neck. In fact, Dr. Richardson specifically documented on May 17, 2018 that he moved forward with the cancer treatment, "After discussing all this with the patient and with Dr. Paynter . . ." (Joint Ex. 7, p. 121)

On September 18, 2018, Dr. Paynter opined:

> Patient's hip symptoms at this point, as well as in the past have been primarily intra-articular in nature. He does have a metastatic prostate cancer lesion, however, with his history and physical examination [it] is more likely that a majority, if not all of his symptoms are related to the

> intra-articular pathology. This is due to a labral tear as well as an exacerbation of degenerative arthritis in a work-related injury.

(Joint Ex. 6, p. 84)

In a supplemental report requested by claimant's counsel and signed on July 5, 2019, Dr. Paynter confirmed that he believes claimant's diagnosis is a left hip labral tear with degenerative arthritis aggravated by the work injury and that the mechanism of injury explained by claimant is consistent with this diagnosis. (Joint Ex. 6, p. 88) On September 12, 2019, Dr. Paynter further explained his opinion, noting:

> Patient has symptoms that are likely related to intra-articular pathology. He does have a metastatic prostate cancer lesion[;] based upon the fact that he does not have rest pain and his symptoms are only related to activity, it is likely related to his labral tear and potentially degenerative changes in his hips.

(Joint Ex. 6, p. 92) Ultimately, claimant submitted to an injection into his left hip with some resolution of symptoms on September 26, 2019. (Joint Ex. 6, pp. 94-95) Dr. Paynter confirmed that the temporary relief of pain symptoms confirmed an intra-articular source of his injury. (Joint Ex. 6, pp. 96-97)

Defendants questioned the cause of claimant's ongoing left hip pain and sought an independent medical evaluation performed by Robert L. Broghammer, M.D. on July 23, 2018. Dr. Broghammer noted that claimant's left hip symptoms appeared to improve with treatment of his prostate cancer. (Defendants' Ex. A, p. 8) Therefore, Dr. Broghammer opined that it is "relatively clear" that claimant's current "left hip complaints are due to his personal condition of metastatic prostate cancer to the left femoral neck and are unrelated to his alleged work injury of July 31, 2017." (Defendants' Ex. A, p. 7)

Instead, Dr. Broghammer opined that claimant sustained, at most, a left hip strain that resolved prior to his initial evaluation by Dr. Stec. (Defendants' Ex. A, p. 8) Dr. Broghammer further opined that the presumed labral tear is likely a degenerative finding, not caused by the alleged work injury, because labral tears are not caused by lifting from a static position. (Defendants' Ex. A, p. 15) Dr. Broghammer opined that claimant required no permanent restrictions and suffered no permanent impairment of the left hip as a result of the events of July 31, 2017. (Defendants' Ex. A, p. 11)

Mr. Pierce also sought an independent medical evaluation, performed by Farid Manshadi, M.D., on August 20, 2020. Dr. Manshadi viewed the evidence quite differently. He opined that cancer pain is typically constant in nature, whereas, claimant's pain was generally caused by movement of the left hip joint. (Claimant's Ex. 1, p. 5) Therefore, Dr. Manshadi opined that the events of July 31, 2017 aggravated claimant's pre-existing degenerative changes in the left hip joint and caused the labral tear in the left hip. (Claimant's Ex. 1, p. 5)

Dr. Manshadi acknowledged that claimant's left hip pain improved after the treatment of his prostate cancer. However, he opined that any ongoing pain after the

cancer treatment occurred is the result of degenerative changes and the left hip labral tear. (Claimant's Ex. 1, pp. 5-6)

In this case, standing alone, either Dr. Manshadi's opinion or Dr. Broghammer's opinion could be viewed as reasonable and convincing. Both support their analysis with reasonable and rational arguments about the cause of claimant's ongoing left hip symptoms. Yet, neither of these physicians is an orthopaedic surgeon, an oncologist, or a urologist.

In this case, the treating urologist and the treating orthopaedic surgeon appear to have worked together and communicated about claimant's condition. The treating urologist, Dr. Richardson, is the most qualified and knowledgeable physician offering an opinion about the effects of prostate cancer. The treating orthopaedic surgeon, Dr. Paynter, is the most qualified and knowledgeable physician offering an opinion about the effects of the July 31, 2017 left hip injury. Both of these physicians evaluated claimant multiple times over an extended course of treatment. The fact that these two physicians communicated with each other during their treatment of claimant suggests that they were well informed, looking for the best possible outcome of their mutual patient, and their opinions are considered credible and convincing.

I specifically find the opinions of Dr. Paynter and Dr. Richardson to be the most convincing causation evidence in this record. To the extent that Dr. Manshadi's opinions align with these other physicians' opinions, his opinions are also accepted. Therefore, I also find that claimant has proven that a majority of his ongoing left hip symptoms, including a material aggravation of the underlying degenerative left hip changes and the left hip labral tear, are causally related to the work events of July 31, 2017.

Only Dr. Broghammer and Dr. Manshadi address the issue of permanent impairment in this evidentiary record. Given Dr. Manshadi's opinions align closely with the most credible physicians' causation opinions, and given that Dr. Broghammer's opinions are contrary to the treating physicians' opinions and rejected, I accept the permanent impairment rating offered by Dr. Manshadi. Specifically, I find that Mr. Pierce proved he sustained a 24 percent permanent impairment of the left lower extremity as a result of the July 31, 2017 work injury as a result of reductions in his left hip ranges of motion. (Claimant's Ex. 1, p. 6) According to Table 17-3 on page 527 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, this converts to 10 percent of the whole person and is found to be accurate.

With respect to physical restrictions resulting from the July 31, 2017 injury, four physicians have offered opinions. Dr. Stec imposed temporary work restrictions. However, she passed care over to Dr. Paynter and did not offer opinions about permanent work restrictions. It is unknown whether Dr. Stec would continue to impose the same restrictions or declare them to be permanent. Therefore, I will not consider Dr. Stec's restrictions as permanent restrictions.

Dr. Broghammer opined that claimant requires no permanent work restrictions as a result of the left hip injury occurring on July 31, 2017. (Defendants' Ex. A, p. 11) However, I have not found Dr. Broghammer's diagnosis of a left hip strain to be convincing or his causation opinions to be convincing. Therefore, I find that Dr. Broghammer's opinions about permanent restrictions, or the lack thereof, are based upon an inaccurate diagnosis and not convincing.

Dr. Manshadi opines that claimant requires permanent restrictions. He opines that claimant should avoid prolonged walking, traverse stairs only occasionally, not lift greater than 30 pounds, and avoid crawling, ladders, kneeling, and crouching. (Claimant's Ex. 1, p. 6)

In a July 18, 2019 note, Dr. Paynter recommends that claimant not lift more than 20 pounds, not twist, climb, kneel, stoop, squat, limit his walking, and not engage in repetitive movements involving the left hip. (Joint Ex. 6, p. 90) However, Dr. Paynter responded to an inquiry from a long-term disability carrier about claimant's residual physical abilities. Specifically, on February 12, 2020, Dr. Paynter opined that claimant could sit and stand constantly and walk frequently. (Joint Ex. 6, p. 99) Dr. Paynter further opined that Mr. Pierce could lift over 100 pounds on an occasional basis and could carry over 100 pounds on an occasional basis. He limited claimant's stair climbing to a frequent basis and permitted occasional ladder climbing. Dr. Paynter further permitted claimant to perform frequent stooping, kneeling, crouching, and crawling. (Joint Ex. 6, p. 100)

Claimant contends that the February 12, 2020 restrictions from Dr. Paynter are erroneous and should be disregarded. However, claimant did not correct or clarify these restrictions with Dr. Paynter. When pondering these restrictions, it seems unlikely claimant improved sufficiently to permit lifting and carrying over 100 pounds. Yet, surveillance video in this case also demonstrates claimant performing significant stooping and bending while performing hours of work in his garage using hand tools. The surveillance video demonstrated claimant performing some hip torquing approximately 2 hours and 16 minutes into the video. Claimant demonstrated no significant symptoms or obvious difficulties after performing this function. (Defendants' Ex. E)

I find no explanation for the significant change in restrictions made by Dr. Paynter. This leaves me less confident in the final restrictions offered by Dr. Paynter to the long-term disability carrier. On the other hand, Dr. Manshadi imposes restrictions that preclude lifting over 30 pounds and avoidance of crawling, ladders, kneeling, and crouching. Claimant is not observed performing many of these tasks on the surveillance video. A 30-pound lifting restriction seems reasonable. I find Dr. Manshadi's restrictions to be realistic, reasonable, and convincing. I accept Dr. Manshadi's restrictions as applicable for claimant.

Mr. Pierce is an older worker. He was approaching retirement age but there is no evidence that he intended to retire soon after the injury. Mr. Pierce applied for several jobs after he was unable to return to Evergreen. Mr. Pierce appears to be a

motivated employee that is willing to continue working. He certainly has a long history of consistent work. He testified that, but for the work injury, he intended to continue working for an indefinite time until he no longer felt that he could continue to work.

On the other hand, he self-limited the types of work he was willing to consider after the injury. Defendants retained the services of Lana Sellner, a vocational specialist, to assist claimant in his job search after the injury. (Defendants' Ex. I, J) Ms. Sellner is somewhat critical of claimant because he was not willing to consider jobs for which he is qualified and physically capable because they are outside of his "comfort zone." She also notes that claimant required certain wages to consider returning to work. Although Ms. Sellner was not able to secure employment for claimant, she opines that he remains employable in the labor market.

Claimant retained his own vocational specialist, Barbara Laughlin, who performed an interview and offered her opinions. Ms. Laughlin opines that claimant is no longer employable in the labor market. Ms. Laughlin identifies errors or weaknesses in Ms. Sellner's analysis and recommended jobs for claimant. However, Ms. Laughlin offers no services to assist claimant in his job search and offers no alternate jobs for which he could apply. (Claimant's Ex. 2) Yet, claimant has restrictions that permit him to lift up to 30 pounds on an occasional basis and that seem reasonable for a potential return to work in some capacity.

I certainly acknowledge Ms. Laughlin's argument and opinion that Mr. Pierce's age increases the difficulties to find future employment. Yet, claimant received some interviews since his injury. He retains significant physical capabilities, outlined by Dr. Manshadi. I do not find Ms. Laughlin's ultimate conclusion and opinion to be convincing.

At the end of my analysis, I do not concur that claimant is incapable of performing gainful employment activities within well-known branches of the labor market. Rather, I find that claimant remains employable and that there are employment opportunities available to claimant. These opportunities may be outside his "comfort zone" and they most certainly will pay significantly less than his prior position with Evergreen.

Considering claimant's age, his proximity to retirement, his willingness to continue working, his employment history, educational qualifications, permanent restrictions, the length of his healing period, his permanent functional impairment, his motivation to return to employment, as well as the unlikelihood that, at his age, claimant will successfully retrain to alternate skilled work, and all other factors of industrial disability identified by the Iowa Supreme Court, I find that Mr. Pierce proved he sustained a 75 percent loss of future earning capacity as a result of the July 31, 2017 work injury.

Mr. Pierce asserts a claim for healing period benefits and asserts he should be awarded healing period benefits from July 1, 2019 through August 20, 2020. Defendants challenge this entitlement and assert, even if claimant has proven

permanent disability, he was released from care on an as needed basis on June 18, 2018 and that Dr. Paynter assigned permanent restrictions on June 10, 2019. Defendants contend that either of these dates represent maximum medical improvement (MMI) and that claimant cannot realistically receive healing period benefits after he achieved MMI. Claimant contends that he did not achieve MMI until declared to have achieved MMI by Dr. Manshadi on August 20, 2020.

Mr. Pierce clearly continued to seek medical care for his left hip symptoms after June 18, 2018. On June 26, 2018, Dr. Paynter recommended claimant return in six months, or sooner, for repeat x-rays. (Joint Ex. 6, p. 81) Claimant returned to Dr. Paynter three months later on September 18, 2018. (Joint Ex. 6, p. 83) However, on that date, Dr. Paynter did release claimant from care, only to be followed as needed. (Joint Ex. 6, p. 84)

Claimant followed-up again with Dr. Paynter in September 2019 and a repeat MR arthrogram of the left hip was recommended. Claimant then received a left hip injection on September 26, 2019 with some symptomatic relief. (Joint Ex. 6, pp. 94-95) Dr. Paynter re-evaluated claimant on October 8, 2019 and again released claimant to return for care on an as-needed basis. (Joint Ex. 6, pp. 96-97) No further treatment is documented with Dr. Paynter after October 8, 2019. I find that claimant achieved MMI on October 8, 2019 from his left hip injury. Mr. Pierce was under restrictions resulting from the work injury from July 1, 2019 through October 8, 2019 and he was not working during that period of time.

The parties also dispute the weekly rate at which benefits should be paid to claimant. The parties dispute whether claimant was married on the date of injury and the number of exemptions to which he was entitled. The parties also dispute claimant's average gross weekly earnings at the time of the injury.

Mr. Pierce called Hazel Pierce to testify about their marriage. Ms. Pierce testified that she and Mr. Pierce were married in 1992. They had a significant disagreement in 2006 and ultimately obtained a legal divorce in 2007. (Tr., p. 32-34) They were never again formally married in a civil or religious ceremony. (Tr., p. 37)

Ms. Pierce testified that she and Mr. Pierce lived apart for a period of time after their formal divorce. However, she testified that they reconnected within six months, still visited each other, that she watched claimant's cat when he was gone on work, and that their grandchildren were upset that they split. By Christmas of 2017, she testified that they decided to work it out, got back together, and considered themselves to be married. (Tr., pp. 32-37) Ms. Pierce testified that she considered herself married to Mr. Pierce at the time of hearing. (Tr., pp. 36-37)

Mr. Pierce also testified about his marital relationship. Specifically, claimant testified that he lived in an apartment for 11 months after their split. However, claimant continued to pay for his share of the living expenses in the couple's home even after their divorce. Ultimately, he returned to the marital home and remained living at that

residence at the time of the 2017 work injury. Mr. Pierce testified that he feels he has an agreement with Hazel Pierce that they are married. (Tr., p. 68)

Claimant conceded at trial that he and Hazel Pierce use separate bank accounts. However, he testified they maintained separate bank accounts prior to their divorce as well. (Tr., pp. 69-70) Mr. Pierce also testified that Hazel remains a beneficiary on his life insurance policy and for his 401(k) account. (Tr., pp. 74-75)

Mr. Pierce acknowledged that he signed a domestic partner agreement with his employer to permit Ms. Pierce to remain on his health insurance. (Tr., p. 75) Mr. Pierce's earnings documentation also notes that he represented himself as "single" to the employer. (Defendants' Ex. B, p. 20; Tr., pp. 142-143)

Claimant also acknowledged that he claimed Hazel as a dependent on his taxes but did not list her as a spouse. (Tr., pp. 73, 141) In fact, in his 2014, 2015, and 2016 tax returns, Mr. Pierce declared Hazel Pierce as a dependent but claimed no specific relationship to her. He specifically did not file using a married status in his 2014, 2015, and 2016 tax returns. (Claimant's Ex. 8, pp. 89-91) Again, on his 2017 tax returns, Mr. Pierce filed as a single individual and claimed Hazel Pierce as a dependent but not as a spouse. (Claimant's Ex. 8, pp. 92-93) Mr. Pierce asserts that he explained the situation and it was his tax preparer that determined how to file the return. (Tr., pp. 72-73)

Certainly, it is possible that Mr. Pierce is not knowledgeable as to tax implications and relied upon a tax preparer to determine his filing status. Yet, there are other troubling issues in this case that call claimant's marital status into question. For instance, in the initial written report of injury after the 2017 work injury, claimant noted he was "unmarried." (Claimant's Ex. 3, p. 75)

Claimant refers to himself as divorced several times in medical records. For instance, prior to the injury in 2011, claimant referred to himself as "Divorced." (Joint Ex. 1, p. 1) He reiterated that he was divorced and did not proclaim to be married in a patient information form dated August 18, 2011. (Joint Ex. 1, p. 2) Similarly, after the injury Mr. Pierce noted to his treating physicians that he was divorced. (Joint Ex. 8, pp. 146, 153, 163, 175, 180, 199)

Considering all of the competing evidence regarding Mr. Pierce's marital status on the date of injury, I find that claimant failed to prove that he was married on the date of injury. While claimant and Hazel Pierce testified that they considered themselves to be married, they clearly obtained a legal divorce. After resuming cohabitation after their legal divorce, Mr. Pierce made several public declarations that refute a belief he was married on the date of injury.

I find the preponderance of the evidence demonstrates that Mr. Pierce represented himself as single or divorced to his physicians both before and after the injury. I find the preponderance of the evidence demonstrates that Mr. Pierce represented himself as single or divorced to his employer both before and after the date of injury. I find the preponderance of the evidence demonstrates that Mr. Pierce

represented himself as single to both the United States government and the tax authorities in Iowa when he filed tax returns both before and after the date of injury.

I find the representations made to his physicians, employer, and the federal and state taxing authorities belie his current claim and Hazel Pierce's claim that they considered themselves married on the date of injury. Ultimately, I find that Mr. Pierce failed to prove by a preponderance of the evidence that he was married on the date of injury.

The parties also note a dispute about claimant's entitlement to exemptions on the date of injury. Although the parties note this as a disputed issue, the facts relevant to claimant's exemptions are really not disputed. Defendants raise no challenges to exemptions in their post-hearing brief. Claimant's 2017 tax returns clearly note claimant asserts exemptions for himself, an additional exemption because he was above the age of 65, and a claim of Hazel Pierce as a dependent and exemption. I find that claimant was single and entitled to three exemptions on the date of injury. (Defendants' Ex. C, p. 27)

Also in dispute is Mr. Pierce's gross average weekly wages immediately prior to the injury date. For purposes of calculating the average gross weekly earnings, Mr. Pierce contends that some of his shorter weeks of work should be excluded as unrepresentative of his typical earnings. Specifically, Mr. Pierce contends that the wages paid from April 29, 2017 through May 27, 2017 and from February 18, 2017 through March 31, 2017 should be excluded and that earnings from January 1, 2017 through April 16, 2017 should be substituted to generate claimant's "typical" weekly earnings prior to the date of injury.

Defendants contend that the 14 weeks immediately prior to the date of injury are representative of claimant's typical earnings and should be considered. Defendants point out that claimant's job required significant travel and that his hours of work varied significantly from week to week depending on where the work was located and how long any specific repair would take. Therefore, defendants contend that the 14 weeks immediately preceding the date of injury should be considered representative and included in the calculation of claimant's average weekly wages.

Review of the parties' arguments and the pertinent payroll documentation in Defendants' Exhibit B discloses that claimant's wages varied significantly from pay period to pay period. He never worked less than 95 hours during a two-week pay period immediately prior to the injury date. Facially, claimant's argument is that the pay periods he worked only 95 hours could be considered unrepresentative or atypical given the higher hours worked during other pay periods.

However, claimant conceded at trial that his work required significant travel. (Tr., p. 152) Mr. Pierce also conceded that his hours of work varied significantly, depending on where he was assigned to work, how much travel was required, and the amount of work required to be performed for each client on-site. (Tr., p. 152) Claimant did not testify to any irregularities in his work shifts or assignments during the pay periods he

now seeks to challenge and eliminate. Claimant does not appear to have taken vacation, been laid off, or been assigned irregular work or assignments during these weeks.

Rather, the evidence establishes that his hours varied significantly from week to week and pay period to pay period based on travel and service requirements. This was typical for claimant's job. Therefore, I find that the hours and earnings reflected in Defendants' Exhibit B, page 19 are typical of claimant's job and earnings. Specifically, I accept the defendants' calculations and find that claimant's average weekly wage immediately prior to the date of injury was $1,573.05.

Mr. Pierce seeks payment of past medical expenses. He introduces Claimant's Exhibit 12 in support of this claim. Review of Claimant's Exhibit 12 demonstrates that it contains charges from Dr. Paynter, Dr. Richardson, and Dr. Gilbert. All charges incurred for treatment with Dr. Richardson are related to treatment of claimant's prostate cancer. None of Dr. Richardson's charges is related to the treatment of the left hip injury.

However, the charges from Dr. Paynter and Dr. Gilbert are related to claimant's left hip injury at Evergreen on July 31, 2017. Review of the patient transaction report demonstrates charges of $1,000.00 from Dr. Paynter on January 23, 2019 and April 11, 2019. There are no corresponding medical records for these dates. Instead, it appears these charges are related to conferences between attorneys and Dr. Paynter. These charges do not appear to be for treatment of claimant's injury and are not medical expenses that should be compensated as medical bills for treatment.

All other charges from Dr. Paynter and Dr. Gilbert listed on Claimant's Exhibit 12 appear to be related to treatment of claimant's left hip injury. These charges are found to be reasonable and necessary for treatment of claimant's left hip injury. It is not apparent that there are any outstanding charges from either Dr. Paynter or Dr. Gilbert contained in Exhibit 12. However, to the extent that there are outstanding charges or charges paid directly by claimant, those are found to be reasonable and related to claimant's July 31, 2017 work injury.

Claimant also seeks an order granting him alternate medical care. Specifically, claimant seeks an order authorizing Dr. Paynter to provide future orthopaedic care for claimant's left hip. Having proven that his ongoing left hip symptoms are causally related to the July 31, 2017 work injury, I must also consider whether claimant is entitled to alternate medical care for his left hip.

Review of the medical records in this case demonstrates Dr. Paynter released the claimant from further orthopaedic care on October 8, 2019. (Joint Ex. 6, pp. 96-97) I found that claimant achieved maximum medical improvement for his left hip injury on October 8, 2019. Claimant has not actively sought medical care for his left hip since that date. No other physician is recommending treatment for claimant's left hip at this time. In fact, claimant's independent medical evaluator, Dr. Manshadi, confirmed MMI in his report. Therefore, I find that claimant failed to prove that defendants have

declined or refused to offer reasonable and necessary medical care. At this point in time, no further medical care is indicated or recommended for claimant's left hip.

CONCLUSIONS OF LAW

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 found the opinions of Dr. Paynter, Dr. Richardson, and Dr. Manshadi to be the most convincing. Relying upon those medical opinions, I found that claimant proved permanent disability as a result of the July 31, 2017 left hip injury at work. Accordingly, I conclude that claimant has proven entitlement to an award of permanent disability benefits in some amount.

A hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

Having found that claimant proved he sustained permanent disability as a result of a left hip injury, I conclude that Mr. Pierce has proven he sustained an unscheduled injury. Iowa Code section 85.34(2)(v).

In 2017, the Iowa legislature changed the provisions of Iowa Code section 85.34(2)(v). To obtain an award of industrial disability after the statutory change, claimant must establish that he has been terminated from employment. In this case, claimant has proven that he was terminated following the work injury. Accordingly, I

conclude that his injury should be compensated with industrial disability. Iowa Code section 85.34(2)(v).

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.

Mr. Pierce asserted that he is permanently and totally disabled as a result of the July 31, 2017 work injury.

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

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

In this case, I found that Mr. Pierce did not prove he is permanently and totally disabled. Instead, I accepted the vocational opinions of Ms. Sellner and found that claimant remains qualified and capable of performing jobs that are available within well-known branches of the labor market. Although claimant did perform a significant job search, his restrictions permit him to continue working if he chooses to do so. Therefore, I conclude that claimant did not prove he is permanently and totally disabled as a result of the July 31, 2017 work injury.

In the alternative, claimant asserted that he is an odd-lot employee.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Mr. Pierce certainly established a prima facie case as an odd-lot employee in this case. He presented a significant work search as well as a vocational opinion. If not rebutted, this evidence could establish Mr. Pierce is an odd-lot employee. However, the employer met its evidentiary burden as well and produced a vocational report rebutting claimant's prima facie evidence.

Therefore, the ultimate burden of persuasion reverted to claimant and his need to prove he is an odd-lot employee and that the only services he can now provide are so limited in quality, dependability, or quantity that a reasonably stable labor market for those services does not exist. For reasons similar to the permanent total disability analysis, I conclude that claimant did not carry this burden of persuasion. Accordingly, I conclude that claimant failed to prove by a preponderance of the evidence that he is an odd-lot employee.

Having rejected the permanent total disability and odd-lot claims, I must consider the extent of claimant's industrial disability resulting from the July 31, 2017 work injury. I considered all of the relevant, available factors outlined by the Iowa Supreme Court to assess industrial disability. I found that Mr. Pierce proved a 75 percent loss of future earning capacity as a result of the July 31, 2017 work injury. This is equivalent to a 75

percent industrial disability and entitles claimant to an award of 375 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v) (2017).

Claimant last sought medical care on October 8, 2019. Having found that to be the date of maximum medical improvement, I conclude that permanent disability benefits should commence on October 9, 2019. Iowa Code section 85.34(2).

Mr. Pierce also asserts a claim for healing period benefits from July 1, 2019 through August 20, 2020.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, I found that claimant was off work and on light duty work restrictions that precluded a return to substantially similar work from July 1, 2019 through October 8, 2019. However, I found that claimant achieved maximum medical improvement on October 8, 2019. Accordingly, I conclude that healing period benefits are payable from July 1, 2019 through October 8, 2019 but terminate upon claimant achieving maximum medical improvement. Iowa Code section 85.34(1).

I must also determine the rate at which weekly benefits should be paid. Iowa Code 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.

Mr. Pierce testified that he was paid hourly in his position with the employer. 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, claimant's earnings are presented in bi-weekly format. Both parties argue for use of bi-weekly earnings and use 14 weeks of earnings to calculate the weekly rate. Having reviewed the evidence of claimant's earnings, I found that his

earnings varied significantly from pay period to pay period. However, I found nothing irregular or atypical about claimant's earnings during the 14 weeks immediately prior to the date of injury. Rather, I found that those weeks were typical of his earnings based on the variability of his travel and work schedule for the employer. Therefore, I found that defendants' calculations contained at Defendants' Exhibit B, page 19 fairly represented claimant's typical earnings prior to the date of injury. Accordingly, I conclude that claimant's gross average weekly wage prior to the date of injury was $1,573.05.

The parties also dispute claimant's marital status and entitlement to exemptions. Mr. Pierce asserts he was married on the date of injury. However, claimant and Hazel Pierce obtained a formal divorce in 2007. They never obtained a formal civil or religious marriage again after their divorce. Therefore, claimant asserts he and Hazel Pierce were married under Iowa common law on the date of his injury.

This agency has previously considered the issue of common law marriage. In Hernandez v. IBP, Inc., File No. 1106018 (Arbitration October 1995), Deputy Commissioner Michael Trier considered a very similar factual situation. Then Deputy Trier held:

> The three elements of a common-law marriage are well settled. The party carrying the burden must prove all the elements of common-law marriage by a preponderance of the evidence. In re Marriage of Grother, 242 N.W.2d 1 (Iowa 1976). There is no presumption that persons are married and the burden of proving marriages rests on the party who asserts it. All essential elements of the alleged marital relationship must be shown by clear, consistent and convincing evidence. The legal rights and responsibilities that accompany marriage, whether ceremonial or common-law, do not extend to an unmarried couple who are cohabiting together in a stable and significant relationship. Laws v. Griep, 332 N.W.2d 339 (Iowa 1983). One of the evidentiary facts that the undersigned considers important when dealing with a common-law issue is whether or not the purported holding out of being husband and wife is done uniformly and consistently. The fact that persons might represent themselves to be husband and wife in social settings is not afforded great weight if they represent themselves to be single when dealing with the more important affairs of life. The undersigned considers that the representations made on tax returns which carry criminal penalties for misrepresenting and on forms with an employer are much more reliable indicators of marital status. The record in this case does not show any joint ownership of property or anything beyond the mere allegation of holding out socially. It is concluded that the claimant has failed to prove by a preponderance of the evidence that she has a common-law marriage with Rivaldo Rodriques. Her weekly compensation benefit should therefore be determined with her being a single person.

To establish a common law marriage, the claimant must show three elements: (1) a present intent and agreement to be married; (2) continuous co-habitation; and (3) a public declaration that the parties are married. In re Marriage of Gebhardt, 426 N.W.2d 651, 652 (Iowa App. 1988). Claims of common law marriage are carefully scrutinized and claimant bears the burden of proof to establish he was married on the date of injury. In re Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004).

In this case, Mr. Pierce has proven that he and Hazel Pierce have continuously cohabitated since they reconciled. Arguably, he has also proven that he and Hazel Pierce had a present intent and agreement to be married as of the date of injury. However, much like Deputy Trier in the Hernandez case, I found that claimant did not prove the public declaration element to establish a common-law marriage.

Mr. Pierce referred to himself as "divorced" in medical records. Claimant filed tax returns as a single individual. While declaring and claiming Hazel Pierce as a dependent, he did not declare her a spouse when filing tax returns. Mr. Pierce also elected to fill out a domestic partner form to permit Hazel Pierce to remain on his health insurance through the employer. Claimant could have declared Hazel Pierce to be his spouse for the same purposes but elected the domestic partner form instead.

Claimant reported himself as single to his employer, as reflected on his wage statements and in his initial injury report to the employer after the injury date. Claimant's formal reports and filings with medical professionals, the tax authorities, and his employer do not demonstrate a consistent public declaration of marriage between Mr. Pierce and Hazel Pierce. I conclude that claimant failed to carry his burden of proof to establish he was legally married at the time of his work injury on July 31, 2017.

However, claimant clearly did claim Hazel Pierce as a dependent for purposes of his taxes on the date of injury. He was over the age of 65 at the time of his injury and was also entitled to claim himself as an exemption. I conclude claimant is entitled to have his weekly benefit determined using a single with three exemptions status.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $1,573.05, that he was single, and that he was entitled to three exemptions on the July 31, 2017 injury date, I used the Iowa Workers' Compensation Manual with effective dates of July 1, 2017 through June 30, 2018, to determine that the applicable rate for permanent partial disability benefits is $904.45 per week.

Mr. Pierce introduced Claimant's Exhibit 12, which includes an unsigned affidavit and an attached patient transaction and itemization from Physicians Clinic of Iowa.

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 the treatment rendered by Dr. Richardson is related to claimant's prostate cancer and not related to the work injury, none of the charges noted in Claimant's Exhibit 12 for services rendered by Dr. Richardson are owed by defendants. However, I did find the medical treatment provided by Dr. Paynter and Dr. Gilbert are related to claimant's July 31, 2017 work injury with Evergreen. With the exception of the $1,000.00 medical charges for attorney conferences with Dr. Paynter on January 23, 2019 and April 11, 2019, the remainder of the medical charges noted in Claimant's Exhibit 12 were found to be related, reasonable, and necessary. I conclude, to the extent not already satisfied, defendants are obligated to pay, reimburse claimant, or otherwise satisfy and hold claimant harmless for all medical charges noted in Claimant's Exhibit 12 from Dr. Paynter and Dr. Gilbert. Iowa Code section 85.27(1).

Mr. Pierce also asserts a claim for alternate medical care and requests an order of this agency authorizing Dr. Paynter for future treatment of his left hip. Accordingly, I must consider whether an order for alternate medical care is appropriate at this time.

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.

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).

"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).

Having found that claimant last treated for his left hip in October 2019 and was released by the treating orthopaedic surgeon on October 8, 2019, I found that there was no ongoing treatment of the left hip. Additionally, having found that no other physician has recommended additional treatment for claimant's left hip, I conclude that claimant failed to prove defendants refused or failed to offer appropriate and reasonable medical care for his left hip condition. In fact, there does not appear to be any need or recommendation for additional treatment of the left hip at this time. Therefore, I conclude that claimant failed to prove his claim for alternate medical care and, if additional treatment is indicated or requested for the left hip into the future, defendants retain their right to select the authorized medical provider for such care. Iowa Code section 85.27(4).

Finally, claimant requests that his costs be taxed against defendants. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992).

Mr. Pierce seeks assessment of his filing fee ($100.00) as well as the cost of service upon defendants ($6.80). Both of these costs are reasonable and appropriate pursuant to 876 IAC 4.33(3) & (7). Defendants are taxed with the costs of the filing fee and service expense.

Claimant requests the costs of a court reporter's attendance at the deposition of defendants' vocational expert, Lana Sellner, be taxed against defendants. Iowa Code section 86.18(2) permits the deposition of any witness to be taken and used as evidence in a hearing before this agency. Accordingly, it is appropriate and permissible for claimant to request and take the deposition of Ms. Sellner. The transcript of her deposition was introduced at the hearing. Agency rule 876 IAC 4.33(1) permits the assessment of the cost of a court reporter's attendance for a deposition. Accordingly, I assess the cost ($52.50) of the court reporter's attendance for Ms. Sellner's deposition against defendants.

Agency rule 876 IAC 4.33(3) permits the assessment of "transcription costs when appropriate." Given that claimant had the right to depose Ms. Sellner, I find it also appropriate to tax the court reporter's expense ($176.25) for Ms. Sellner's deposition.

Defendants challenge whether it is appropriate to tax the expense of a copy of a deposition transcript obtained solely for the convenience of counsel. However, I note that defendants introduced claimant's deposition transcript into evidence in this case. I conclude that it is reasonable and appropriate to tax the transcription costs of Mr. Pierce's deposition transcript given that defendants introduced that deposition transcript into evidence. Accordingly, I tax defendants $184.80 for the transcription of Mr. Pierce's deposition. 876 IAC 4.33(2).

Mr. Pierce also seeks assessment of the cost of Ms. Laughlin's vocational assessment and report. However, I did not rely upon or find Ms. Laughlin's opinions convincing in this record. Accordingly, I decline to assess any expenses related to Ms. Laughlin's opinions.

Claimant also seeks assessment of the fees charges by his independent medical evaluator, Dr. Manshadi. I did find Dr. Manshadi's opinions to be helpful and relied upon those opinions particularly with respect to work restrictions and partially in relation to the causation issue. Accordingly, it may be appropriate to tax some or all of Dr. Manshadi's fees.

According to his billing statement, Dr. Manshadi charged $400.00 for his independent medical evaluation. He charged an additional $1,600.00 for his report in this case. Dr. Manshadi's charges for his evaluation are clearly not taxable as a cost under Iowa Code section 86.40 or 876 IAC 4.33(6). Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

Dr. Manshadi's charges for drafting a report are potentially taxable. I have some concern about the fact that Dr. Manshadi authored a seven-page report, which identifies numerous medical records he reviewed. I am suspicious that Dr. Manshadi lumped in all his charges for his medical review as part of his report. In fact, his statement contains no charges for his review of prior medical records. Nevertheless, I will accept his statement at face value in this situation because my suspicions are based on nothing other than speculation. I will accept Dr. Manshadi's statement at face value and assess the cost ($1,600.00) of his report pursuant to 876 IAC 4.33(6).

As a final cost, Mr. Pierce seeks an order assessing the expense of his attorney's conference with Dr. Paynter. The invoice from Dr. Paynter's office clearly reflects that the charges were "for consultation with Dr. Paynter." (Claimant's Ex. 11, p. 192) The Iowa Supreme Court was clear that agency rule 876 IAC 4.33(6) only permits assessment for the expense of a report prepared in lieu of trial testimony. Young, 867 N.W.2d at 846. The expense of an attorney conference with a physician is not a taxable cost pursuant to 876 IAC 4.33. Therefore, claimant's request to tax this expense for the conference with Dr. Paynter is denied. In total, I conclude it is appropriate to assess $2,120.35 in costs against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from July 1, 2019 through October 8, 2019.

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on October 9, 2019.

All weekly benefits shall be payable at the weekly rate of nine hundred four and 45/100 dollars ($904.45) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

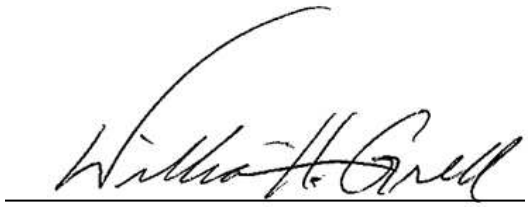
Defendants shall satisfy, pay, or reimburse all medical expenses incurred for treatment with Dr. Paynter and Dr. Gilbert, as reflected in Claimant's Exhibit 12 and as limited and described in the body of this decision.

Claimant's alternate medical care request is denied at this time.

Defendants shall reimburse claimant's costs in the amount of two thousand one hundred twenty and 35/100 dollars ($2,120.35).

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 ___22nd___ day of April, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Casey Steadman (via WCES)

Jennifer Clendenin (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.