BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ONOFRE MONSALVO LOPEZ, Claimant, vs. SEABOARD TRIUMPH FOODS, INC., Employer, and CCMSI, Insurance Carrier, Defendants.	:	File No. 21006717.01 ARBITRATION DECISION Head Note Nos.: 1400, 1402, 1402.20, 1402.40,1800, 1801, 1801.1, 1802, 1803, 2700

STATEMENT OF THE CASE

The claimant, Onofre Monsalvo Lopez, filed a petition for arbitration seeking workers' compensation benefits from employer Seaboard Triumph Foods ("Seaboard") and their insurer CCMSI. Steven Howard appeared on behalf of the claimant. Meredith Ashley appeared on behalf of the defendants. Also present was Beatriz Bermudez.

The matter came on for hearing on October 5, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Claimant's Exhibits 1-12, and Defendants' Exhibits A-F. The defendants initially decided to not offer Defendants' Exhibit D. The claimant then indicated that they would offer Defendants' Exhibit D into evidence as a Claimant's Exhibit. The defendants objected to this, as Defendants' Exhibit D relates to an eye condition. In a previous ruling denying a continuance of this matter, the claimant represented that the eye was a separate issue and not relevant to the hearing. The claimant argued that the exhibit was relevant to the question of whether the claimant refused available work due to his termination. The objection was sustained and Defendants' Exhibit D was excluded from evidence. The remainder of the exhibits were received into the record without objection.

The claimant testified on his own behalf with the assistance of interpreter Joel Turcios. Gina Castro was appointed the official reporter and custodian of the notes of the proceeding. The hearing lasted a considerable amount of time, and another reporter was called in to complete the official transcript. That reporter is Roxann Zuniga. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on November 11, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury, which arose out of, and in the course of, employment on October 14, 2020.

3. That, at the time of the alleged injury, the parties believe that the weekly compensation rate is five hundred thirty and 33/100 dollars ($530.33) per week.

4. That the costs listed in Claimant's Exhibit 1 have been paid.

The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of temporary disability during a period of recovery.

2. Whether the claimant is entitled to temporary partial disability benefits from October 19, 2020, through January 27, 2021.

3. Whether the claimant is entitled to a running award of temporary total disability and/or healing period benefits on a running basis from January 28, 2021, through the October 5, 2022, date of the hearing, and ongoing.

4. Whether the claimant was off work from January 28, 2021, through October 5, 2022, and ongoing.

5. Whether the alleged injury is a cause of permanent disability.

6. The extent of permanent partial disability benefits, should any be awarded.

7. Whether the disability is an industrial disability.

8. Whether the commencement date for permanent partial disability benefits, if any are awarded, is October 25, 2021.

9. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

10. Whether an assessment of costs is appropriate.

FINDINGS OF FACT

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

Onofre Monsalvo Lopez, the claimant, was 52 years old at the time of the hearing. (Testimony). He currently resides in South Sioux City, Nebraska, but was born in Mexico. (Testimony). He came to the United States of America in 2002. (Testimony). He possesses a work permit so that he can work in the United States. (Testimony). He has a sixth-grade education. (Testimony). He did not pursue additional education since moving to the United States. (Testimony). He speaks very little English. (Testimony).

Mr. Lopez worked at Tyson for about nine years. (Testimony). He worked in a cleaning role where he washed areas with hoses. (Testimony). He estimated that the hoses that he used weighed between 60 and 70 pounds. (Testimony). He used the hose for about four hours per day. (Testimony). He earned eight and 00/100 dollars ($8.00) per hour in that role. (Testimony). He quit this job because he was displeased with the pay. (Testimony).

From 2014 to 2016, Mr. Lopez worked for Curly's, a subsidiary of Smithfield Foods. (Claimant's Exhibit 2:6; Testimony). He performed clean-up work at a meatpacking plant. (Testimony). He washed material with hoses and hot water. (Testimony). He estimated that the hoses weighed between 60 and 70 pounds. (Testimony). He held the hose for about four hours. (Testimony). He left Curly's because they were bought and the new company paid him less. (Testimony).

Between his work at Curly's and his next job, Mr. Lopez worked in a metal shop for a rancher. (Testimony). He painted pig fencing. (Testimony). This was a seasonal position, and he worked June to September of 2016. (Testimony).

For five months between 2016 and 2017, Mr. Lopez worked for Palmer Candy. (CE 2:6). He packed candy and cookies into little bags. (Testimony). He earned ten

and 00/100 dollars ($10.00) per hour. (Testimony). He was laid off from Palmer because their work is seasonal in nature. (Testimony).

Prior to beginning work with Seaboard, Mr. Lopez had a pre-employment physical examination at UnityPoint Occupational Medicine, on July 26, 2017. (Claimant's Exhibit 2:2-9). Mr. Lopez denied having any prior health issues, nor had he sought any treatment by a doctor for a pre-existing injury or had any surgeries. (CE 2:4-5). Mr. Lopez also denied having any prior workers' compensation claims. (CE 2:5). He indicated that he could work in extreme hot and cold environments, and could stand 8 to 10 hours without pain. (CE 2:5). Mr. Lopez had functional range of motion in all measured areas during his examination. (CE 2:7). The examination was completed, including a lift test that Mr. Lopez was able to complete. (CE 2:8).

Mr. Lopez began work for Seaboard in August of 2017. (Testimony). Mr. Lopez worked as a janitor in the cooler/main break area at the Seaboard plant. (CE 10:68). He testified that he picked up pieces of pigs that would fall on the ground. (Testimony). This included hams weighing 30 to 35 pounds. (Testimony). After picking up pig scraps, he would place them into a garbage bin. (Testimony). According to a document in evidence, one of the essential functions of the job was to "[p]ick up downed hogs." (CE 11:70). The job also required the claimant to push items weighing up to 60 pounds up to 35 inches on an occasional basis. (CE 11:70). He was required to pull hoses this distance, as well. (CE 11:70). The claimant needed to have 30 pounds of grip strength when controlling the aforementioned hoses. (CE 11:70). He constantly needed to reach an arm's length in order to access rails and overhead areas for cleaning. (CE 11:70). He needed to be able to occasionally horizontally pull downed hog carcasses weighing up to 40 pounds from a 37-inch height up to 50 feet. (CE 11:70). He also needed to occasionally grip up to 55 pounds while moving carcasses on the floor. (CE 11:70). He had to constantly balance and stand, while occasionally walking on the cement floor. (CE 11:70). Mr. Lopez also needed to be able to frequently bend, occasionally crawl, and occasionally crouch or kneel. (CE 11:70). Finally, in a document provided in evidence, it was noted that Mr. Lopez was required to lift 50-pound tubs of scraps to dump down a chute, and use a squeegee to move product from under a machine. (CE 11:72).

Mr. Lopez described his typical day of work at Seaboard. (Testimony). He would arrive at 5:15 a.m., and collect refuse containers and trays. (Testimony). Once the production line started, he would begin to gather leftovers and garbage as they fell from the line. (Testimony). This included items like hams or loins. (Testimony). If they were larger items like half pigs, "other men" would be called in to pick them up and dump them. (Testimony). He testified that he was "not supposed" to be picking up those kind of items. (Testimony). He would then discard the refuse which he collected, and clean the bins and containers. (Testimony). His day ended about one hour after the line shut down, as he and his co-employees would continue until they had everything cleaned up. (Testimony).

The claimant was terminated for a short period of time in 2019 due to a misunderstanding. (Testimony). He went on vacation, and when he returned, he was not allowed back into the plant. (Testimony). He thought that he had approval for taking a vacation before leaving. (Testimony). His union then advocated for him with human resources and he was given his job back. (Testimony).

Mr. Lopez testified that on October 14, 2020, he was working on the line at Seaboard. (Testimony). His supervisor asked him to bring down three hog carcasses from above him on a ledge. (Testimony). Mr. Lopez alleged that he told his supervisor that the hog would need to be cut first "because they were too heavy for me to bring them down unless they were cut in half…" (Testimony). He estimated that the hog weighed 100 to 130 pounds. (Testimony). He testified that his supervisor told him to bring them down because no one was available to cut the hog carcasses. (Testimony). He began to pull down a hog carcass and lifted it, when he "immediately felt a crack and pop in [his] back." (Testimony). After feeling the pop, he developed a lump in his back. (Testimony). He dropped the carcass, and sat still. (Testimony). He testified that he developed a fever, as well. (Testimony). He told his supervisor that he injured himself, at which time his supervisor sent him to the infirmary. (Testimony). He further testified that Seaboard took him to a doctor in Omaha on this day. (Testimony). However, there is no record of a visit on October 14, 2020. Mr. Lopez testified that he did not return to work the next day because he could not stand up straight due to pain. (Testimony). He indicated that he did not return to work until five days later, as he could not get out of bed for four days. (Testimony). He contradicted this a little bit, in testifying that his family had to help him out of bed so that he could use the bathroom. (Testimony).

On October 19, 2020, Mr. Lopez reported to CompChoice, where Darin Gregory, M.D., examined him. (CE 3:10-13). Mr. Lopez told Dr. Gregory that he had left low back pain since October 14, 2020. (CE 3:10). He also complained of initial paresthesias and weakness in his entire left leg, along with continued paresthesias down the posterior part of his leg to the knee. (CE 3:10). He also had soreness with bending. (CE 3:10). Dr. Gregory diagnosed the claimant with a left lumber strain. (CE 3:10). He recommended that the claimant pursue physical therapy, use ice and heat, and take naproxen. (CE 3:10). Dr. Gregory provided restrictions for the claimant including: lifting up to 10 pounds "but not from the floor," pushing and pulling up to 20 pounds, no climbing ladders, and no frequent bending or stooping. (CE 3:10). Dr. Gregory requested that the claimant return on November 2, 2020, for a re-evaluation. (CE 3:10).

Mr. Lopez began therapy on October 23, 2020. (CE 4:32-35). Mr. Lopez told the therapist that he was "bent over lifting a half hog." (CE 4:33). He indicated that he had pain in the back of his thigh and his back when he bent over. (CE 4:33). He also had pain when getting up. (CE 4:33). He rated his pain 8-9 out of 10 when bending over and 2 out of 10 when walking. (CE 4:33). The therapist observed that the claimant had pain when bending over and lifting. (CE 4:33). The therapist opined that the claimant needed therapy in order to reduce rotation, restore full function to the low back and pelvis, reduce pain and swelling, and restore his functional work activities. (CE 4:34).

Mr. Lopez returned to Dr. Gregory's office at CompChoice on November 2, 2020. (CE 3:14-17). Mr. Lopez had been off work, using vacation time. (CE 3:14). He reported doing better; however, he complained of slow progress. (CE 3:14). He also complained of pain at night, pain with bending, and pain with rising from a seated position. (CE 3:14). He also noted pain with standing and walking for a long period of time. (CE 3:14). He continued physical therapy. (CE 3:14). Upon physical examination, Dr. Gregory found the claimant to have pain to palpation in the bilateral L5 paraspinous areas. (CE 3:14). The claimant had normal straight leg raises and deep tendon reflexes. (CE 3:14). Mr. Lopez displayed decreased and painful bending and rotation to the right side. (CE 3:14). Dr. Gregory continued to diagnose the claimant with a left lumbar strain. (CE 3:14). He also continued to recommend that the claimant attend physical therapy. (CE 3:14). He prescribed tizanidine for pain. (CE 3:14). Finally, the claimant provided changed restrictions, which included: lifting up to 15 pounds and pushing or pulling up to 40 pounds, no climbing ladders, no frequent bending or stooping, no lifting from the floor, and no standing or walking for more than 45 minutes per hour. (CE 3:14). Dr. Gregory asked the claimant to return on November 16, 2020, for additional evaluations. (CE 3:14).

After he returned to work, Seaboard put him on the production line; however, Mr. Lopez told Seaboard that he "couldn't do that because the pain was too intense." (Testimony). He was then put into a recordkeeping role, where he kept track of how many containers were thrown in the trash. (Testimony). There were also times where he visually inspected pigs coming out of the freezer to make sure they were not dirty. (Testimony). In this role, he stood and sat when needed. (Testimony). He testified that, eventually, someone took his chair. (Testimony). He told his supervisor, but alleged that he was never provided a replacement chair. (Testimony). Mr. Lopez testified that he could likely have continued to work this position. (Testimony).

On November 16, 2020, Dean Wampler, M.D., examined the claimant at CompChoice for his continued low back issues. (CE 3:18-21). Mr. Lopez complained of a setback in his recovery. (CE 3:18). He previously reported to his therapist that he was "feeling great;" however, when he returned to work, "he was placed in a position where he was standing most all of the time," which aggravated his issues. (CE 3:18). Mr. Lopez indicated that he felt as bad as he did when he was injured. (CE 3:18). Interestingly, his pain switched from his right lower back to his left lower back. (CE 3:18). Dr. Wampler found marked tenderness to palpation of the left L4-5 and L5-S1 joints. (CE 3:18). He also jumped when the left sciatic notch was palpated. (CE 3:18). Dr. Wampler ordered x-rays of the lumbar spine, which showed some "modest degenerative change higher up" with advanced disk collapse at L5-S1 with bony spurs laterally and anteriorly. (CE 3:18). Dr. Wampler diagnosed Mr. Lopez with low back pain with pre-existing lumbar degenerative disc disease and recurrent radiculitis or radiculopathy. (CE 3:18). Dr. Wampler restricted the claimant to sedentary work only with the ability to stand and walk for 10 minutes every hour. (CE 3:18). Dr. Wampler prescribed naproxen and scheduled a lumbar MRI. (CE 3:18).

The claimant reported to Tri-State Specialists, LLP, for an MRI of the lumbar spine. (CE 5:40-41). The radiologist provided impressions as follows for the claimant:

1. L5-S1 significant degenerative disc space narrowing with low-grade central disc herniation with no current nerve root impingement or displacement noted.
2. Disc space narrowing L1-2 with low-grade broad-based bulging annulus but no nerve root impingement or displacement.

(CE 5:40-41).

Mr. Lopez returned to CompChoice and visited with Dr. Wampler on November 30, 2020. (CE 3:24-26). Mr. Lopez told Dr. Wampler that he experienced "significant improvement," which he attributed to his supervisors following the provided restrictions so that he could alternate between sitting and standing. (CE 3:24). Dr. Wampler reviewed physical therapy notes, which indicated that the claimant reported being 70 percent improved. (CE 3:24). Dr. Wampler observed the claimant having improved lumbar mobility with tenderness over the left sacroiliac joint and the sciatic notch. (CE 3:24). Dr. Wampler told Mr. Lopez through an interpreter that he had arthritis in his low spine, but that the MRI showed no nerve impingement. (CE 3:24). Dr. Wampler opined that this would continue to improve and not need surgery. (CE 3:24). Dr. Wampler prescribed additional muscle relaxers and continued therapy. (CE 3:24). Dr. Wampler kept his restrictions the same, and would begin a transitional return to work program as of the next visit. (CE 3:24).

On December 14, 2020, Dr. Gregory examined Mr. Lopez again at CompChoice for his lumbar strain. (CE 3:27-28). Mr. Lopez felt 75 percent improved. (CE 3:27). He described proceeding through an FCE, during which he could lift up to 30 pounds before he experienced pain. (CE 3:27). Mr. Lopez indicated that physical therapy helped him. (CE 3:27). When Dr. Gregory examined Mr. Lopez, he found mildly decreased flexion, but normal rotation. (CE 3:27). Dr. Gregory also found left SI and sciatic notch pain upon palpation. (CE 3:27). Dr. Gregory recommended that the claimant continue physical therapy, and refilled a prescription for tizanidine. (CE 3:27). Dr. Gregory also provided work restrictions which included: lifting up to 25 pounds, no frequent bending or stooping, and being allowed to take a 10-minute break every hour as needed from standing and walking. (CE 3:27). Dr. Gregory asked the claimant to return on December 28, 2020, for "reevaluation and discharge" if he was doing well. (CE 3:27).

Dr. Gregory saw Mr. Lopez for a repeat visit on December 28, 2020. (CE 3:29-31). Mr. Lopez continued to complaint of "a lot of pain." (CE 3:29). Dr. Gregory noted that the pain may have been exacerbated by lifting done during physical therapy. (CE 3:29). Upon physical examination, Dr. Gregory noted that Mr. Lopez displayed decreased right side bending and flexion with pain. (CE 3:29). Mr. Lopez also had pain with palpation of the left paraspinous lumbar area "down into his left mid buttocks area." (CE 3:29). Dr. Gregory recommended that the claimant had an "ortho spine consultation" since the pain persisted for two months with no progress over recent visits.

(CE 3:29). Dr. Gregory provided restrictions including: lifting up to 30 pounds, and no frequent bending or stooping. (CE 3:29).

On January 4, 2021, Mr. Lopez had another therapy evaluation. (CE 4:36-38). He had attended 17 physical therapy visits, and had not missed any sessions. (CE 4:36). He felt about 50 percent improved; however, he felt worse since having to do a lifting exercise. (CE 4:36). He rated his pain 6 out of 10. (CE 4:36). Mr. Lopez felt that he was not ready to perform his job lifting pigs, as he was unable to lift "something that heavy." (CE 4:36). Mr. Lopez was not using proper lifting techniques and required verbal cues for certain lifts. (CE 4:37).

Pedro Ricart-Hoffiz, M.D., examined the claimant at Miller Orthopedic Specialists on January 7, 2021, based upon a referral from Dr. Gregory. (CE 6:42-43). Mr. Lopez told the doctor that, two months ago, he was lifting a small hog when he experienced a sharp, dull ache in the left side of his lower back. (CE 6:42). Mr. Lopez noted he completed physical therapy, which helped him greatly. (CE 6:42). He reported pain of 6 out of 10, and noted that a recent therapy visit exacerbated his symptoms. (CE 6:42). He brought his MRI reports with him for review by Dr. Ricart-Hoffiz. (CE 6:42). Upon examination, Mr. Lopez had mild tenderness to palpation in the left paraspinal musculature, along with mild discomfort with lumbar range of motion. (CE 6:42). The doctor observed that Mr. Lopez ambulated with a normal gait. (CE 6:42-43). After reviewing the results of the previous MRI, Dr. Ricart-Hoffiz diagnosed Mr. Lopez with chronic back pain and a muscle strain, degenerative disc disease at L5-S1, and mild lumbar stenosis at L1-2. (CE 6:43). The doctor opined that the claimant had fairly benign symptoms that only worsened with lifting greater than 20 pounds. (CE 6:43). Dr. Ricart-Hoffiz opined that the claimant should not lift more than 20 pounds until he could review the x-rays, and that the claimant's pain was "likely associated to exacerbation of his pre-existing disease." (CE 6:43).

Mr. Lopez was discharged from physical therapy on January 8, 2021, after his previous referral expired with no new referral issued. (CE 4:39).

Mr. Lopez provided the defendant-employer with a certificate to return to school/work on January 25, 2021. (CE 10:63, 66). Tonya Flaugh, A.R.N.P. from Siouxland Community Health Center signed off on the form and indicated that the claimant's absence from work on January 25, 2021, and January 26, 2021, should be excused. (CE 10:66). Ms. Flaugh concluded that the claimant could return to work on January 27, 2021, with no restrictions. (CE 10:66).

Seaboard terminated Mr. Lopez effective February 2, 2021. (CE 10:67). His human resources file indicates that his last date worked was January 21, 2021. (CE 10:67). Mr. Lopez testified that this was inaccurate, and that he worked several other days after January 21, 2021. (Testimony). Mr. Lopez indicated that he had an eye infection, returned to work to discuss his absence, and told the human resources team that he needed "a few days to be able to recuperate." (Testimony). Human resources told him that they wanted him at work the next day, or he would be fired. (Testimony).

Mr. Lopez did not return to work on January 27, 2021, as indicated by Ms. Flaugh's letter. (Testimony). He testified that he needed more time to recover and that he could not see or drive due to an eye infection. (Testimony). Of note, Mr. Lopez did not have a driver's license, so it is unclear how his alleged inability to drive was a hindrance to his reporting to work. (Testimony). He was terminated due to a two-day absence. (CE 10:68). Mr. Lopez did not contact his union representative in order to seek reinstatement, as he felt "really bad." (Testimony).

Dr. Ricart-Hoffiz responded to a letter from "Marlene Bieghler" on March 23, 2021. (DE B:10). He opined that Mr. Lopez's work injury correlated for an exacerbation of pre-existing disease "as a baseline" for his workers' compensation injury. (DE B:10). He continued by opining that the claimant responded to conservative care before re-aggravating his injury in physical therapy. (DE B:10).

On April 15, 2021, Mr. Lopez continued his care with Dr. Ricart-Hoffiz. (CE 6:44-45). He continued to perform his home exercises and use over the counter pain medications, but his back pain continued to be 6 out of 10. (CE 6:44). This included shooting pain mostly on the left. (CE 6:44). Mr. Lopez still had mild tenderness to palpation in his left paraspinal musculature and minimal discomfort with his lumbar range of motion. (CE 6:44). Mr. Lopez now had a mildly antalgic gait. (CE 6:44). Dr. Ricart-Hoffiz ordered x-rays of the lumbar spine, which showed mild-to-moderate multilevel degenerative changes and degenerative disc disease. (CE 6:44). The changes were most significant at L5-S1. (CE 6:44). Dr. Ricart-Hoffiz's diagnoses remained the same. (CE 6:44). The doctor recommended an epidural injection at L5-S1, and requested that Mr. Lopez return three weeks after the injection. (CE 6:44). Mr. Lopez could work as tolerated. (CE 6:44).

On May 4, 2021, Jery Inbarasu, M.D., examined Mr. Lopez at Momenta Pain Care. (DE C:16-21). Mr. Lopez presented for consideration of a L5-S1 lumbar epidural steroid injection. (DE C:16). Mr. Lopez told the provider that he was lifting a 300-pound pig off the floor at his work when he noticed a popping sensation and immediate pain in his left lower back. (DE C:16). Since then, he had pain in his lower back. (DE C:16). Dr. Ricart-Hoffiz referred him for the injection. (DE C:16). He displayed tenderness to palpation over the lower back. (DE C:19). An L5-S1 lumbar epidural steroid injection was performed. (DE C:21).

Mr. Lopez returned to Dr. Ricart-Hoffiz's office on May 27, 2021. (CE 6:46-47). Since his last visit, he had an injection, which "provided little relief." (CE 6:46). The pain was localized to the buttock area, and was worse with touch. (CE 6:46). Mr. Lopez had a normal gait. (CE 6:46). Dr. Ricart-Hoffiz's diagnoses were:

1. Chronic back pain, muscle strain.
2. Degenerative disc disease at L5-S1.
3. Lumbar stenosis, L1-L2, mild.
4. Bilateral SI joint pain.

(CE 6:46). Mr. Lopez did not have relief with the injections, and had pain mostly around his buttock area. (CE 6:46). Dr. Ricart-Hoffiz suspected that Mr. Lopez had residual symptoms of SI joint pain. (CE 6:46). Mr. Lopez indicated that he would like a trial of a diagnostic therapeutic injection of both of the SI joints. (CE 6:46). The doctor allowed him to continue to work as tolerated. (CE 6:46).

Mr. Lopez reported to Andrew Huff, M.D., at Bluffs Pain Management on August 3, 2021, for evaluation of chronic low back pain. (Defendants' Exhibit A:1-2). Mr. Lopez complained that his pain was worse when he bent forward and backwards. (DE A:1). He noted that he tried physical therapy, but did not have any improvement. (DE A:1). Mr. Lopez displayed tenderness to palpation of the lumbar spine. (DE A:2). Dr. Huff also observed that Mr. Lopez had decreased range of motion and pain with motion in his lower back. (DE A:2). Dr. Huff provided the claimant with a sacroiliac joint injection. (DE A:2). He immediately had 85 percent to 90 percent improvement of his pain after the injection. (DE A:2).

On August 26, 2021, Mr. Lopez returned to Dr. Ricart-Hoffiz's office for continued back and bilateral leg pain follow-up. (CE 6:48-49). He rated his pain 7 out of 10, and told the doctor that his SI joint injection provided little relief. (CE 6:48). Activity and ambulation worsened his pain. (CE 6:48). Mr. Lopez continued to have tenderness to palpation in his bilateral PSIS and mild discomfort with lumbar range of motion. (CE 6:48). Dr. Ricart-Hoffiz opined that, since Mr. Lopez had no relief from his SI joint injections, it was not likely that sacroiliitis was contributing to his current complaints. (CE 6:48). He thus recommended a repeat L5-S1 epidural injection. (CE 6:48). If that injection failed to provide relief, the doctor recommended two surgical options. (CE 6:48). Dr. Ricart-Hoffiz allowed the claimant to work as tolerated. (CE 6:48).

Mr. Lopez also reported to Dr. Huff's office on August 26, 2021. (DE A:3-4). Mr. Lopez complained that the previous SI joint injection did not help much. (DE A:3). Dr. Huff discussed treatment options for the claimant. (DE A:4). Dr. Huff observed that the claimant ambulated with a limp. (DE A:4). He also continued to have tenderness on palpation in the lumbar spine. (DE A:4). Dr. Huff wanted to see the claimant's MRI studies before he opined on potential additional treatment options. (DE A:4).

On September 1, 2021, Dr. Huff added an item to the August 26, 2021, medical record. (DE A:4). He was able to obtain the MRI studies, and opined that they showed "Modic type II endplate changes at L5-S1 and a degenerative disc with a central disc bulge" at that level. (DE A:4). Based upon that, Dr. Huff recommended that the claimant have an epidural steroid injection to see if it provided any improvement. (DE A:4). Dr. Huff also considered whether the claimant may be a candidate for an intercept procedure. (DE A:4).

Dr. Huff saw Mr. Lopez again on September 21, 2021, for his continued low back complaints. (DE A:5-6). Dr. Huff performed an intralaminar epidural injection for the claimant at L5-S1. (DE A:5-6).

Mr. Lopez continued his care with Dr. Ricart-Hoffiz on September 23, 2021. (CE 6:50). An epidural injection provided two days prior helped his leg symptoms; however, he continued to complain of a sore back. (CE 6:50). The doctor recorded that this injection "relieved more symptoms than his SI joint injection previously." (CE 6:50). Dr. Ricart-Hoffiz requested that Mr. Lopez return in three weeks in order to determine whether the injection was successful. (CE 6:50). Mr. Lopez expressed an interest in radiofrequency ablation if his pain returned. (CE 6:50). Dr. Ricart-Hoffiz continued to allow the claimant to work "[a]s tolerated." (CE 6:50).

Mr. Lopez returned to Dr. Huff's office on October 12, 2021, for continued pain management treatment. (DE A:7-8). Mr. Lopez told Dr. Huff that the injection helped "some," but he was still having low back pain that radiated to the left leg. (DE A:7). He rated his improvement 30 percent to 40 percent. (DE A:8). Dr. Huff opined that the claimant failed conservative therapy and continued to have low back pain despite injections. (DE A:8). Based upon the failure of conservative care, Dr. Huff recommended a "basivertebral nerve ablation at L5 and at S1." (DE A:8).

On October 25, 2021, Mr. Lopez returned to Dr. Ricart-Hoffiz's office to follow-up his epidural injection. (CE 6:51). Mr. Lopez noted that he continued to work and that he was "doing fairly well." (CE 6:51). The doctor opined that Mr. Lopez continued to respond to conservative treatment, and he recommended that they continue to observe the claimant. (CE 6:51). Dr. Ricart-Hoffiz deferred to the pain management physician for additional pain control measures, but noted that Mr. Lopez was to return to his office on an as needed basis. (CE 6:51). The doctor continued to allow the claimant to work, "[a]s tolerated." (CE 6:51).

Dr. Ricart-Hoffiz responded to another letter from Jennifer Thompson on January 28, 2022. (DE B:15). The doctor opined that the claimant's referral to pain management on October 5, 2021, was causally related to his October 14, 2020, work injury. (DE B:15). Dr. Ricart-Hoffiz opined that the claimant suffered "an exacerbation of his pre-existing disease with findings of degenerative disc disease at L5-S1." (DE B:15). The doctor recommended a follow-up letter with Dr. Huff regarding a plan of treatment, and noted that he could not provide any permanent impairment rating since Mr. Lopez had yet to achieve maximum medical improvement ("MMI"). (DE B:15).

On February 1, 2022, Dr. Huff wrote a letter to "Jennifer," in which he outlined the treatment that he provided to Mr. Lopez. (DE A:9). Dr. Huff opined that there were two potential treatments available for Mr. Lopez's axial low back pain. (DE A:9). The first is a single injection of VIA disc, which is a cadaver disc emulsion to replace disc height and provide improvement of function. (DE A:9). The alternative is a basivertebral nerve ablation of L5 and S1. (DE A:9). Dr. Huff concluded, "[o]therwise, from my standpoint the patient will have reached MMI. He should continue on anti-inflammatory medication and nonopioid pain medication and possibly back bracing." (DE A:9).

In response to a check-box letter signed May 10, 2022, Dr. Ricart-Hoffiz agreed that it was undetermined as to whether the claimant was a surgical candidate. (CE

7:52). In order to determine whether the claimant was a surgical candidate, the doctor agreed that he would need to re-examine Mr. Lopez. (CE 7:52). Dr. Ricart-Hoffiz agreed that Mr. Lopez suffered an on-the-job injury which consisted of an aggravation of a pre-existing condition. (CE 7:52). The doctor indicated a re-examination would be helpful, but also hand-wrote, "recommend an FCE [functional capacity evaluation]." (CE 7:52). Dr. Ricart-Hoffiz also handwrote the following:

> Depending on main complaint or ongoing issue would determine candidacy for one procedure or the other, given he has shown both radicular and axial back pain as complaint in the past.
>
> If only radicular symptoms, repeat MRI for up-to-date assessment of lateral recess stenosis to discuss laminotomy.
>
> If axial back pain major component [*sic*], then ALIF would be an option.

(CE 7:52).

Anke Horacek, M.D., of Physician Legal Consultants of Nebraska LLC, drafted a records review and medical opinion, dated September 15, 2022. (CE 8:53-58). Dr. Horacek was retained by claimant's counsel. (CE 8:53). She never examined Mr. Lopez, however, she did have a phone conversation with him. (CE 8:53). Dr. Horacek is board certified in emergency medicine. (CE 9:60). Dr. Horacek noted the claimant's description of the alleged incident and his subsequent medical care. (CE 8:54). According to her, Mr. Lopez continued to suffer from low back pain, "which has prevented him from working and participating in everyday activities." (CE 8:54). Based upon a citation to some academic journals, Dr. Horacek opined that Mr. Lopez met "the injury symptom causation requirements for his low back pain," and that even if he had "pre-existing degenerative disease of his lumbar spine, it was asymptomatic." (CE 8:54). Dr. Horacek cites to several factors which support her opinion. (CE 8:54-55).

Mr. Lopez told Dr. Horacek that he continued to have low back pain in his left lower back area, and that he recently noticed right back pain and numbness in his right leg. (CE 8:55). Staying in one place for too long aggravated Mr. Lopez's pain. (CE 8:55). He also had increased pain with lifting and bending. (CE 8:55). Mr. Lopez claimed to Dr. Horacek that he could no longer pick up his 40 pound two year old daughter. (CE 8:55). Dr. Horacek opined that Mr. Lopez required "ongoing treatment of his [Mr. Lopez's] low back pain and will more likely than not require surgery on his lumbar spine in the future to maximize function and mobility." (CE 8:58). Dr. Horacek concluded that Mr. Lopez would require another lumbar spine MRI, treatment with an orthopedic surgeon, an anterior lumbar interbody fusion, a laminectomy, treatment with a chronic pain specialist, physical therapy, additional injections, a radiofrequency ablation, and aquatherapy. (CE 8:58).

Since his termination by Seaboard, he has not worked anywhere. (Testimony). Mr. Lopez testified that he had not contacted his union representative at Seaboard in

attempting to obtain reinstatement following his termination. (Testimony). He testified that he felt he could not do anything besides "walk a little bit." (Testimony). Mr. Lopez felt that he could not bend down, squat down, or pick up any kind of weight. (Testimony). He felt that he could not return and perform the same job he performed on October 14, 2020, because he had "a lot of pain." (Testimony). He also felt that he could not perform the job that he previously held at Curly's because he had to pull and carry heavy hoses. (Testimony).

Mr. Lopez testified that he never had back pain before October 14, 2020. (Testimony). He also never missed work because of a back problem prior to the date of injury, nor did he operate under any restrictions. (Testimony). He never saw a doctor for his back prior to the October 14, 2020, incident. (Testimony).

Mr. Lopez described his typical day at the time of the hearing. (Testimony). He took 500 mg of Tylenol in order to relieve his pain, and he does not do "a whole lot." (Testimony). He walks a little, and takes his children to school. (Testimony). He was able to walk two-to-three blocks to where the school bus picks up his children. (Testimony). Otherwise, he testified that he could not do "much of anything" because of his pain. (Testimony). He cannot lift anything more than 15 pounds. (Testimony). Mr. Lopez has applied for Social Security Disability Benefits, but his application has yet to be approved. (Testimony). He also does not possess a driver's license. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.904(3).

Temporary Disability

The claimant seeks an award of temporary partial disability benefits from October 19, 2020, through January 27, 2021. This is based upon an argument that the claimant was working in a light duty capacity during this time, and was working "less than full hours." See Hearing Report, pg. 3. The claimant further argues that he is entitled to temporary total disability benefits from January 28, 2021, through October 5, 2022, and ongoing as a running award. This is based upon an argument that the claimant has not been "offered suitable work" pursuant to Iowa Code section 85.33. The defendants argue that the claimant's October 14, 2020, work injury was not a cause of temporary disability, and even if it was, the claimant is only entitled to temporary partial disability benefits for a short period of time.

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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

While a claimant is not entitled to compensation for the results of a preexisting disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

The claimant testified that he suffered an injury to his lower back while working at Seaboard on October 14, 2020. The claimant was asked to move a hog carcass. Based upon varying statements made by the claimant to medical providers and under oath, the type of hog carcass varies. It was either a 130-pound, one-half hog or an entire 300-pound carcass. It is unclear exactly how the injury occurred, as the claimant again testified to several different potential mechanisms of his injury. These included him lifting the carcass, him sliding the carcass off of a platform, and him moving the carcass across a surface. The claimant never settled on one possible mechanism, which damaged his credibility. However, the parties previously stipulated that the claimant suffered an injury that arose out of, and in the course of, the claimant's employment with Seaboard. The question becomes whether the claimant's injury on October 14, 2020, was a cause of temporary disability.

Mr. Lopez interacted with a hog carcass and felt a "crack and pop" in his lower back. He stopped what he was doing and sat still for a short time. He testified that he felt a lump in his lower back, and alleged that he immediately developed a fever. However, there is no objective evidence in the record that the claimant developed a true fever. Mr. Lopez testified that he was sent to the infirmary on-site, and then was taken to a doctor in Omaha. There is no record of a medical appointment in Omaha on October 14, 2020. This discrepancy is another factor that damaged the claimant's credibility.

The claimant then did not work for several days. He did not seek medical care during this time. He testified that he could not get out of bed, but he later contradicted this in noting that he could get out of bed with help from his family so that he could use the toilet.

On October 19, 2020, the claimant reported to Dr. Gregory's office at CompChoice. He complained of left lower back pain. He also noted that he initially had paresthesias and weakness along his entire left leg, but that these had dissipated. Dr. Gregory diagnosed Mr. Lopez with a left lumbar strain, and recommended that he pursue physical therapy. He also provided the claimant with restrictions.

Mr. Lopez began therapy on October 23, 2020. He then returned to Dr. Gregory's office. Mr. Lopez told Dr. Gregory on November 2, 2020, that he had been off work, using vacation time in order to rest. He complained of slow progress in healing. He also complained of pain at night, pain with bending, and pain with rising from a seated position. Dr. Gregory found the claimant to have pain at the bilateral L5 paraspinous areas, and noted that the Mr. Lopez displayed normal straight leg raises. Dr. Gregory recommended that the claimant continue attending physical therapy. He also provided reduced restrictions of: lifting up to 15 pounds and pushing or pulling up to 40 pounds, no climbing ladders, no frequent bending or stooping, no lifting from the floor, and no standing or walking for more than 45 minutes per hour.

Dr. Wampler next examined Mr. Lopez on November 16, 2020, at which time, Mr. Lopez complained of a setback in his recovery. He claimed that he was previously "doing great," but when he returned to work, he was placed in a position in which he stood for most of the time. He claimed that this aggravated his condition. Dr. Wampler ordered x-rays and noted that the claimant had low back pain with pre-existing lumbar degenerative disc disease and recurrent radiculitis or radiculopathy. Dr. Wampler restricted the claimant to sedentary work with the ability to stand and walk for 10 minutes every hour.

An MRI ordered by Dr. Wampler revealed significant degenerative disc space narrowing with low grade disc herniation at L5-S1, and disc space narrowing at L1-2 with low-grade broad based bulging annulus. No nerve root impingement or displacement was noted on the MRI.

When Mr. Lopez next saw Dr. Wampler, he noted "significant improvement," thanks to Seaboard abiding by Dr. Wampler's previously provided restrictions. Dr. Wampler noted that the claimant had improved lumbar mobility. Dr. Wampler told Mr. Lopez that he had arthritis in his lower back, but that he would continue to improve and not require surgery. Dr. Wampler did not change the restrictions and discussed beginning a return-to-work program at his next visit.

Mr. Lopez returned to see Dr. Gregory in mid-December of 2020, at which time, he felt 75 percent improved. Dr. Gregory tweaked the restrictions, and asked the claimant to return in two weeks. When Mr. Lopez returned in two weeks, Mr. Lopez claimed that he had "a lot of pain," and that he had been doing lifting during physical therapy prior to his pain worsening. Dr. Gregory provided additional restrictions, and referred the claimant to an "ortho spine consultation."

Considering Dr. Gregory's referral, Mr. Lopez visited with Dr. Ricart-Hoffiz. Dr. Ricart-Hoffiz opined that Mr. Lopez had fairly benign symptoms, and that Mr. Lopez's symptoms were worsened by lifting more than 20 pounds. As such, Dr. Ricart-Hoffiz provided additional restrictions to Mr. Lopez of no lifting more than 20 pounds until Dr. Ricart-Hoffiz could review certain imaging. Dr. Ricart-Hoffiz further opined that the claimant's pain was "likely associated to exacerbation of his pre-existing disease."

Mr. Lopez was eventually referred for pain management, which included injections. He had several injections in an attempt to relieve his lower back pain. By April 15, 2021, Dr. Ricart-Hoffiz allowed Mr. Lopez to work "as tolerated." He continued this allowance through October of 2021, which was Mr. Lopez's last appointment with Dr. Ricart-Hoffiz.

One of the pain management doctors was Dr. Huff. He wrote a letter to an individual in which he opined that Mr. Lopez had two potential treatment options from a pain management perspective. He also opined that the claimant achieved MMI, and that he should continue on anti-inflammatories and nonopioid pain medications. On May 10, 2022, Dr. Ricart-Hoffiz opined that Mr. Lopez suffered an on-the-job injury

which consisted of an aggravation of a pre-existing condition. He also recommended a re-examination and an FCE. Dr. Ricart-Hoffiz also briefly discussed a possible surgery, but noted that a re-examination would be needed.

Dr. Horacek then did a records review, and a brief phone interview with Mr. Lopez. She never examined him. She opined that the claimant would require surgical intervention, and that he also needed additional substantial care. Dr. Horacek practices in emergency medicine, and does not appear to have experience or a background in orthopedics.

Based upon the information in the record, Mr. Lopez had degenerative issues with his spine. When he lifted, moved, or generally interacted with a hog carcass on October 14, 2020, he aggravated or "lighted up" his degenerative spine issues. This resulted in temporary disability, the extent of which will be discussed further below.

An employee has a temporary partial disability when, because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code 85.33(2). Temporary partial disability benefits are payable in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

Additionally, Iowa Code 85.33(3) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code 85.33(3).

The Iowa Supreme Court held that there is a two-part test to determine eligibility under Iowa Code 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutler v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work."

Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012). If an employee refuses an offer of temporary work by claiming that the work is not suitable, the employee must communicate the refusal, and reasons for refusal, to the employer in writing when the offer of work is refused. Iowa Code section 85.33(3)(b). If an employee does not communicate the reason for a refusal in writing, the employee is precluded from raising suitability of the work as the reason for refusal until the reason for the refusal is communicated in writing to the employer. Id.

The claimant returned to work around November 2, 2020, after using personal leave time to take himself off work from October 14, 2020. He worked for about 15 days on the line until he returned to Dr. Wampler's office on November 16, 2020. During the November 16, 2020, visit with Dr. Wampler, Mr. Lopez complained that he had a setback in his recovery, as he was not placed in a position accommodating his restrictions. Dr. Wampler provided the claimant with increased restrictions of sedentary work only, with the ability stand and walk for 10 minutes every hour. Upon presenting these restrictions to Seaboard, they placed him in a recordkeeping position. He also visually inspected hog carcasses as they left a freezer. He was given a stool for a short period of time. At some time this was removed, and he was never provided with a replacement stool. However, it is not clear whether Mr. Lopez requested a replacement stool, and his inconsistent testimony on a number of issues made it difficult to trust his testimony as to whether or not he requested a replacement.

The claimant suffered a personal health issue with his eyes, and was off work on January 25, 2021, and January 26, 2021. He was asked by Seaboard to return from his personal issue on January 27, 2021, but he refused to do so. He then failed to return to his job, and was terminated by Seaboard on February 1, 2021.

The claimant's argument in their post hearing brief is difficult to follow, as it seems to confound temporary partial disability benefits and temporary total disability benefits. Temporary partial disability benefits are available when an employee is able to work a position that is consistent with the employee's disability. The claimant worked light duty from about November 2, 2022, to his last day of work on about January 21, 2021, and would have continued working but for his termination on February 1, 2021. The claimant testified that he would have continued to work in the offered position had he not been terminated. Seaboard clearly offered suitable work, based upon the testimony of the claimant and the restrictions provided by Dr. Wampler. By refusing to return to work on January 27, 2021, the claimant refused suitable work. Therefore, his temporary partial disability benefits would cease on this date.

The parties provided pre-injury and post-injury wage records. See DE F:36-48; CE 12:78-89. Prior to his injury, the claimant worked an average of 47.16 hours per week. After his injury, outside of one week in which he worked 23.7 hours, Mr. Lopez worked similar hours. He also earned the same, or more, per hour, as he did prior to his injury. The week in which Mr. Lopez worked 23.7 hours, was November 22, 2020, through November 28, 2020. There is no indication that the claimant was off work, or

worked less during this time due to his back injury. The claimant testified at his hearing that he periodically took time off due to feeling ill from his pre-existing diabetes.

The claimant bears the burden of proving entitlement to temporary partial disability benefits. Based upon the foregoing, the claimant did not prove, by a preponderance of the evidence, that he is entitled to temporary partial disability benefits.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefits depends on whether or not the employee has a permanent disability. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury.

Iowa Code 85.33(1) provides

> ...the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Temporary total disability benefits cease when the employee returns to work, or is medically capable of returning to substantially similar employment.

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus., 881 N.W.2d 360 (Iowa 2012); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

The claimant contends that he is entitled to temporary total disability benefits from the time of his firing on February 1, 2021, to the time of the hearing, and ongoing as a running award. The problem is that the claimant proved that he was medically

capable of returning to employment and worked in an accommodated position with Seaboard until his termination. The claimant was terminated due to an unexcused absence that was the result of an unrelated personal condition. Namely, Mr. Lopez had an eye infection, and was excused from work for two days due to this personal issue. He was allowed to return by a medical professional on January 27, 2021. He failed to do so, and was terminated by Seaboard effective February 2, 2021.

The claimant never sought additional employment after his termination from Seaboard. He did not contact his union representative to attempt to get his job back, as he did in 2019. He did not attempt to return to work on January 27, 2021, nor did he attempt to get an additional medical excuse. He simply abandoned his job at which he was earning the same wages and working in suitable work during similar hours.

Based upon the information in the record, the claimant has not proven an entitlement to temporary total disability and/or healing period benefits.

Permanent Disability

The claimant argues that he is entitled to a running award of temporary disability and/or healing period benefits. I previously ruled that the claimant was not entitled to the same. The parties indicated that there is a dispute as to whether or not the claimant's October 14, 2020, work injury was a cause of permanent disability benefits.

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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is "proximate" when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

While a claimant is not entitled to compensation for the results of a preexisting disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). It is well established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

In reviewing the evidence, there is no medical provider who has opined as to whether or not the claimant's October 14, 2020, work injury was a cause of permanent disability. Therefore, the claimant has failed to carry his burden of proof, and I conclude that the October 14, 2020, work injury was not a cause of permanent disability. Based upon this finding, the claimant would not be entitled to recover industrial disability benefits, and therefore an analysis regarding the same is not necessary.

Alternate Care Pursuant to Iowa Code section 85.27

The claimant argues that he is entitled to additional care via an examination with previously authorized providers, such as Dr. Ricart-Hoffiz.

Iowa Code 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.

Iowa Code 85.27(4).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 18, 1988). Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); 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 (Iowa 1995).

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 care was unduly inconvenient for the claimant. Id. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," and injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

By April of 2021, Dr. Ricart-Hoffiz allowed the claimant to work as tolerated. He continued to attempt injections and additional treatment with pain management doctors. Dr. Huff opined in February of 2022, that there were additional treatment options

available to the claimant, but then noted, "[o]therwise, from my standpoint the patient will have reached MMI. He should continue on anti-inflammatory medication and nonopioid pain medication and possibly back bracing." (DE A:9). Dr. Ricart-Hoffiz agreed in May of 2022, that it was unclear as to whether the claimant was a surgical candidate. Dr. Ricart-Hoffiz recommended a re-examination and/or a FCE. Dr. Horacek, despite never examining the claimant opined that he required a litany of continuing care. I find little value in the opinions of Dr. Horacek in this matter.

The claimant had significant credibility concerns when testifying. He was quite animated during the hearing, and stood on several occasions. He also motioned quite a bit with his hands and arms. This stood in contrast to someone who complained of debilitating pain and an inability to continue working. As noted above, there were also issues with certain parts of the claimant's testimony.

Based upon the information in the record, the claimant has not proven, by a preponderance of the evidence that the care offered is unreasonable. Additionally, the claimant has not proven that the continued care sought is a result of his work injury on October 14, 2020.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 1. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting

additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056587 (App., September 27, 2019).

The claimant seeks reimbursement for the filing fee of one hundred three and 00/100 dollars ($103.00). At my discretion, I decline to award costs to the claimant in this matter.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further.

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 5th day of January, 2023.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Steven Howard (via WCES)

Meredith Ashley (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.