BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COLE NEWTON, Claimant, vs. HY-VEE, INC., Employer, and UNION INS. CO. OF PROVIDENCE, Insurance Carrier, Defendants.	File No. 21700560.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1802, 1803, 2502, 2501, 3000

STATEMENT OF THE CASE

Claimant, Cole Newton, has filed a petition in arbitration seeking workers' compensation benefits against Hy-Vee, Inc., employer, and Union Ins. Co. of Providence, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held via Zoom on August 30, 2022, and considered fully submitted upon the simultaneous filing of briefs September 30, 2022.

The record consists of Joint Exhibits 1-6, Claimant's Exhibits 1-5, Defendants' Exhibits A-I, and the testimony of the claimant and Janel Mortale.

ISSUES

1. Whether claimant sustained a permanent disability arising out of the injury of July 2 ,2022;

2. The application of Iowa Code section 85.34(2)(v);

3. The appropriate commencement date of permanent partial disability benefits, if any are awarded;

4. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;

5. Whether claimant is entitled to future or alternate medical care;

6. The appropriate rate; and

7. Assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate the claimant was an employee at the time of the injury on July 2, 2020. The parties further agree that the injury was the cause of a temporary disability, entitlement to which is no longer in dispute.

FINDINGS OF FACT

Claimant was a 38 year old person at the time of the hearing. He currently lives in Oklahoma with his wife and nine children on a 100 acre farm. On the farm, claimant cares for 13 sheep and plans to increase the flock to 100. He also cares for pigs, chickens, and other farm animals that feed his family. His past education consists of graduation from high school in 2003 with post-secondary studies in theology, English, teaching, and accounting. His past work history includes work for a big box store similar to Walmart or Target and as an English language teacher.

In 2007, claimant began working for defendant employer initially as a utility associate which included cleaning the warehouse, sweeping, scrubbing floors, and similar duties. He worked this position for approximately ten years earning $15.00 an hour at the end of his stint. In 2017, he moved into the position of order selector where he would pick up boxes to fulfill orders at various retail outlets. The job required heavy duty manual labor where he would pick up and move boxes weighing 10-100 pounds. At the time of his injury, he was earning $20.40 per hour. (Testimony of Ms. Mortale)

On or about July 2, 2020, claimant picked up a box and felt pain in his low back. The pain did not abate.

On July 9, 2020, claimant presented to David T. Berg, D.O., at Unity Point Health with complaints of low back pain slightly to the left side of midline. (JE 1:1) The subjective portion of the medical record documents that per the claimant, the pain started three to four weeks prior after bending and lifting boxes at PDI. (Id.) Claimant had no history of back problems. (Id.) On examination, he had mild pain with extension of the lumbar spine, mild tenderness over the left S2 joint with positive FABERE's. (Id.) He was diagnosed with low back strain with left SI joint dysfunction and prescribed Cataflam 50 mg as need and placed on a 20-pound limit work restriction. (Id.)

Claimant did not take the prescription medication but opted for over-the counter Tylenol use. By July 16, 2020, symptoms had largely resolved except for SI joint pain with forward flexion. (JE 1:2)

On July 23, 2020, claimant returned to Dr. Berg, for complaints of low back pain without radiculopathy. (JE 1:3) Claimant was on a 30-pound lifting restriction but continued to have pain across the low back while bending and lifting. (Id.) He had no pain while sitting, standing or ambulating. (Id.) His examination was essentially negative with no joint tenderness, negative straight leg raising, full strength, normal reflexes. (Id.) Dr. Berg referred him to physical therapy. (Id.)

Claimant met with the therapist on July 27, 2020, sharing that he noticed left low back pain in early June that abated with time off of work. (JE 2:1) Upon returning to work, the back pain flared up. (Id.) According to the examination records, claimant walked with a decreased step length and slower cadence. (Id.) He had tenderness at the left paraspinals and left transverse processes. (Id.) He also experienced pain with range of motion. (Id.) The therapist concluded claimant had objective findings of decreased lumbar active range of motion, decreased left lower extremity flexibility, and gait deviations that impaired positional tolerances of standing, sitting, bending, stooping and lifting. (JE 2:2) After several visits, claimant saw improvement. (JE 2:7) On August 6, 2022, he "states with confidence that he is getting better. He notes that tasks such as twisting and walking that were previously difficult have gotten easier." (JE 2:7) On August 7, 2020, he reported a 50 percent overall improvement and that the pain in the left lower extremity had subsided. (JE 2:9)

The physical therapy did help claimant increase his lifting limits but he continued to have pain with forward flexion. (JE 1:5, JE 2:14) At therapy on August 17, 2020, he reported a 70 percent overall improvement with pain upon prolonged operation of the pallet jack and repeated lifting greater than 50 pounds. (JE 2:14) Dr. Berg ordered an MRI on August 18, 2020. (JE 1:5) The MRI showed a very small left-sided disk herniation at L5-S1 with no displacement of the left S1 extremity. (JE 1:6; 3:1) Claimant's symptoms had resolved except for pain in the back when twisting. (Id.) Dr. Berg advised claimant that he was not a good candidate for an epidural, as his back pain was episodic and instead recommended claimant return for additional physical therapy. (JE 1:6)

Claimant was seen on September 1, 2020, for therapy. (JE 2:18) During the early September visits, claimant reported increased difficulty with prolonged sitting and walking at work with limited lumbar range of motion. (JE 2:20)

On September 11, 2020, claimant returned to Dr. Berg with severe complaints of pain in the left SI joint, left lateral hip, and mild left groin pain. (JE 1:7) On examination, claimant had tenderness in the left SI joint and it was difficult for claimant to even sit down on the examination table. (JE 1:7) This was a markedly different presentation than in prior visits.

Claimant requested to be referred to a back specialist. He did not want an epidural and did not want to be prescribed medication. (Id.) Work restrictions on lifting were re-imposed. (JE 1:8)

Claimant was seen by Zachary G. Ries, M.D., on September 23, 2020, for the orthopedic consultation. (JE 4:1) Subjectively, claimant reported a history of pain on and off that worsened last spring. (Id.) Heavy lifting or twisting increased the pain. His pain started in the center of the low back and radiated down the entire posterior aspect of the

left leg stopping at the foot. (Id.) He exhibited a straight leg positive test on the left but otherwise had a normal exam. (JE 4:2) Dr. Reis diagnosed claimant with an acute chronic lumbar radiculopathy secondary to a small disc bulge at L5-S1. (Id.) Claimant reported improvement with physical therapy and was not currently working with any restrictions and thus no restrictions were proffered. (Id.) Dr. Reis recommended a prednisone burst and taper or epidural injection. (Id.) Claimant opted to wait and let them know if the symptoms worsened. (Id.)

On September 30, 2020, claimant was discharged from physical therapy for further referral. (JE2:23)

On October 8, 2020, claimant was seen by Jon Yankey, M.D., for a second opinion regarding his back condition. Dr. Yankey recommended oral medication and a steroid injection. (JE 1:11) Claimant had previously been resistant to medications due to concerns about side effects and he was no different in the visit with Dr. Yankey. (Id.) However, Dr. Yankey was able to convince claimant to accept a prescription for an oral steroid and referred claimant to an additional round of physical therapy. (JE 1:11)

He restarted physical therapy on November 4, 2020. (JE 5:1)

On December 7, 2020, claimant returned for follow up reporting a slight improvement with pain at a 4 on a 10 scale. He shared that pain increased with activities such as putting on or taking off his boots and that his pain increased significantly while at work. He also complained of pain radiating into the left buttocks and down the posterior left leg to his foot. (JE 1:13) There was no palpable tenderness on examination, but claimant did have reduced range of motion and pain with motion. (JE 1:14) Claimant reported that physical therapy had helped in the past and therefore Dr. Yankey referred claimant for additional therapy. (JE 1:15) It was at this visit that Dr. Yankey noted while claimant was previously given a prescription for a depo-medrol dose pak, claimant did not use the prescription. (JE 1:14)

New work restrictions of no lifting, pushing, pulling more than 15 pounds and rarely bending and twisting were imposed. (JE 1:16)

On January 5, 2021, claimant returned for follow-up. (JE 1:17) He reported no change in the pain in his low back and left leg. (Id.) His pain varied from day to day with 2 on a 10 scale on the day of the appointment but 5-6 on a 10 scale the day previous. (Id.) He had been working light duty, three days a week. (Id.)

He moved around the examination room well although slowly. He was able to get on and off the examination table. On palpation there was a slight subjective discomfort reported over the mid and low lumbar spine. There was no tenderness over the lumbar paraspinal areas of the buttocks areas bilaterally. No tightness, guarding or spasms were noted. His back range of motion was as follows:

Forward bending: 80 degrees with slight pain

Backward extension: 10 degrees

Lateral bending: 20 degrees bilaterally with pain on the right

Rotational bending: 20 degrees bilaterally with pain on the left.

Sensation to light touch was slightly and subjectively decreased in the left thigh and left lateral knee area. (JE 1:17)

Dr. Yankey wrote as follows:

> Today, I discussed with the patient that there are no other conservative treatment options available. We again reviewed the spinal surgeon's note, in which the surgeon did not recommend surgery. The patient confirmed again today that he had declined spinal injections at a pain clinic. He also again confirmed today that he has declined to take many of the usual medications for a back injury. Thus, I feel that the patient has no other treatment options available at this time. I discussed my assessment with the patient today. He stated understanding and agreement.

(JE 1:18)

Claimant's work restrictions were maintained. (JE 1:19)

On January 14, 2021, defendants made an offer of "temporary transitional work" of taking the temperature of incoming employees and guests at a light duty wage of $15.77 per hour. (DE A:1) The position was sedentary but the monitor could sit or stand as necessary. (DE A:3) Claimant refused, and wrote, "The pain flares up often without warning. It is so bad I cannot even talk or move. I have come close to passing out due to pain on several occasions mostly recently." (DE A:2) He felt the work was unsuitable for his condition. (DE B:4)

Claimant returned for follow up on March 11, 2021. (JE 1:20) He shared that he was no longer working due to a disagreement with his employer over light duty activities. Instead he has been at home doing activities around the home, helping his wife home school their 8 children. (Id.) During the examination, he was able to move around the room well, get up from the chair and onto the examination table. (Id.) His physical examination was largely normal with increased ranges of motion such as forward bending to 90 degrees with no significant pain, backward extension to 15 degrees, lateral bending to 25 degrees with slight pain in the left and rotational bending to 25 degrees with slight pain on the left. (Id.)

Claimant underwent a functional capacity evaluation at Athletico Physical Therapy on January 28, 2021. (JE 6, p. 1). After the examination and testing, claimant was placed in the heavy physical demand level. (JE 6, p. 1). His activity limitations included: lifting up to 75 pounds from floor to waist occasionally; lifting up to 50 pounds from waist to shoulder occasionally; lifting up to 40 pounds overhead occasionally; bilateral carrying up to 80 pounds occasionally; and horizontal pushing/pulling up to 64.5 pounds of force occasionally. (JE 6, p. 1).

The FCE was reviewed with the claimant on January 5, 2021, with Dr. Yankey. At the time, claimant stated that the test was "not a good test" because the number of repetitions of various testing procedures was not adequate. (JE 1:21) Dr. Yankey wrote as follows:

> I advised the patient that I agree with the results of the FCE and that I am recommending that he follow the activity recommendations from the FCE, as the results were felt to be valid and, thus, accurately reflected his capabilities.
>
> I advised the patient that I am completing the Patient Status Report today to reflect the results of the FCE. After further discussion with the patient, I also recommended that those activity recommendations be designated as permanent activity restrictions. The patient stated understanding.
>
> I again advised the patient today that there are no other conservative treatment options available which had not already been provided to him. I also advised him that no surgical intervention had been recommended. In addition, I advised the patient that he had declined spinal injections and other treatment at a pain clinic. Thus, I advised the patient that there is no other treatment available at this time. Consequently, I advised the patient that he will be discharged from treatment today, 03/11/2021. He stated understanding. At the time of checking out at our front desk, the patient received a copy of today's Patient Status Report. However, the patient declined to sign the Patient Status Report which is the usual procedure when checking out after a visit here.

(JE 1:21) Dr. Yankey filled out a work restriction order to align with the FCE evaluation.

On February 3, 2021, claimant underwent an IME with Sunil Bansal, M.D. (CE 1) In the subjective portion of the report, Dr. Bansal records the etiology of the injury as follows:

> He picks orders all day for the various Hy-Vee stores, and lifts boxes weighing from 10 to 100 pounds. He has to work as fast as he can, as the faster he goes the more he is paid. He has worked there for 13 years, and has been performing this job for three years. He had felt back pain in the past, but it always been short-lived and resolved on its own fairly quickly. However, starting in the fall of 2019 he had pain that was severe enough that he had to stop working. He told his supervisor about his back pain, and was told that it would probably go away.
>
> In 2020 he started feeling increasing pain in the center of his low back, which continued to steadily worsen. It became more frequent and lasted for longer periods of time, and was in the middle and left side of his low back. He went on vacation, and when he returned to work, by the end of his shift he felt like he needed to go home. He thought that the pain would resolve like it had before. He worked on Saturday, and the next day he worked was the following Thursday. The pain never resolved in between. He filled out paperwork and was sent to an occupational physician on July 9, 2020.

(CE 1:7)

At the time of the evaluation, claimant had low back pain radiating down the left leg to the foot. He was limited to 10 minutes of walking. He had pain upon changing positions with the worst pain during forward bending. He was not able to carry his one-year-old daughter for long periods of time. After his return to work, his flare-ups increased. (CE 1:8)

During the examination, he exhibited tenderness to palpation over the lumbar back, positive straight leg raise test on the left, loss of sensory discrimination over the lateral lower leg. (CE 1:9) Dr. Bansal opined claimant's L5-S1 herniation with left-sided radiculopathy that was causally related to or materially aggravated by claimant's work activities. (CE 1:9) Dr. Bansal stated that:

> In my medical opinion, Mr. Newton was engaged in tasks on a daily basis that involved frequent bending and lifting heavy boxes as he picked orders, then stacking the boxes on pallets. This would require forceful mechanical loading in a forward bent position, which is highly pathognomonic for an acute disc herniation.

(CE 1:10) Dr. Bansal cited a medical paper published by the American Academy of Orthopedic Surgeons which stated that disc pressure is increased 100 to 400 percent in the forward flexed spine position, greatly increasing the likelihood of disc bulging and annular tearing. (CE 1:10)

He placed claimant at maximum medical improvement (MMI) as of February 3, 2021, and assigned claimant a 10 percent impairment of the whole person. (CE 1:10-11)

On March 26, 2021, Dr. Yankey authored an opinion letter at the request of the defendants. (DE C) He opined that claimant sustained a low back strain which resolved, a minute disc herniation at L5-S1, and a temporary aggravation of diffuse degenerative joint disease and degenerative disc disease following his work injury of July 2, 2020. (DE C:8) Dr. Yankey was of the opinion that claimant reached MMI on March 11, 2021, due to the visit of the same wherein claimant reported that the back and leg symptoms had improved and been stable for nearly two months. (DE C:7)

Dr. Yankey assigned a zero percent impairment as he placed claimant into the DRE Lumbar Category I which is defined as "no significant clinical findings, no observed muscle guarding or spasm, no documentable neurologic impairment, no documented alteration in structural integrity and no other indication of impairment related to injury or illness; no fractures." (DE C:8)

No further treatment was recommended and claimant was able to work the heavy physical demand level. (DE C:8) While the FCE which Dr. Yankey adopted recommended certain work restrictions, Dr. Yankey believed that that these permanent activity restrictions were related to pre-existing conditions not claimant's work injury. (DE C:9)

On May 27, 2022, Dr. Yankey addressed Dr. Bansal's report in detail. (DE C:12-13) Dr. Yankey detailed what he believed to be inconsistencies between claimant's presentation as documented by Dr. Bansal on February 3, 2021, and claimant's

physical condition on March 11, 2021, during his examination with Dr. Yankey. Dr. Bansal found tenderness with guarding on palpation of the lumbar back and a positive left straight leg test with sensory loss whereas Dr. Yankey did not.

Claimant asserts his gross earnings were $455.80 per week. Defendants assert the correct weekly gross earnings were $371.00. Claimant discarded weeks where he worked less than ten hours or earned "other" pay. (CE 3:1) His wages in 2021 were $657.00. (CE 5:3)

Ms. Mortale testified without rebuttal that there were warehouse positions within claimant's work restrictions set forth by Dr. Yankey that were in excess of the hourly wage claimant earned at the time of his injury. For instance, part-time warehouse selectors or order pickers start at $17.00 per hour and can increase to $21.00 per hour.

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 R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

Claimant has an accepted work injury to his back. Defendants argue that claimant's permanent partial disability benefits should be measured according to Iowa Code section 85.34(2)(v) which provides as follows:

> v. In all cases of permanent partial disability other than those described or referred to in paragraphs "a" through "u", the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation

> under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Claimant was offered light duty work within his restrictions as a temperature checker. Essentially, he was to check the temperatures of incoming staff and other individuals. The work was not sedentary in nature as claimant defined it. Rather, claimant was allowed to sit or stand as necessary. This work was within his light duty restrictions as it allowed a change of position and no lifting, pulling, pushing, bending, or stooping.

Following this, claimant left his employment with defendant and moved out of state. He currently works on his acreage, building a house, doing activities around the home, helping his wife home school their 8 children.

Claimant argues that an employee is allowed to voluntarily refuse an offer of work and still be entitled to benefits. In essence, claimant's argument is that an employee can opt out of Iowa Code section 85.34(2)(v). Conversely, defendants argue that the claimant voluntary transfer to a lower paying position requires an imposition of Iowa Code section 85.34(2)(v). Both parties' arguments appear to accept defendants' position that defendant made a post-injury offer of work at the same or similar wage as claimant's pre-injury wage.

In support of their argument, defendants rely on Pavlich v. Martinez. In that case, the District Court found that the employee's voluntary resignation did not impact whether the disability was measured by functional loss or industrial loss. Instead, because the injured worker had returned to the same employer at same or higher wages, the worker was entitled to functional loss only. Pavlich Inc. v. Martinez, Case No. CVCV060634 (Dt. Ct. Apr. 21, 2021).

Claimant relies primarily on Raley v. Securitas Security Services of USA. Robert Raley v. Securitas Security Services of USA, No. File No. 5067169, 2021 WL 2627118 (Mar. 26, 2021). In Raley, the deputy addressed the issue of termination. Id. at *6. Specifically, whether the injured worker needs to be terminated before receiving industrial benefits. Id. The deputy in the Raley case found that because claimant testified repeatedly he planned to return to work for the employer and that he had not been terminated. Thus, claimant was within a holding period in which functional capacity was the correct measurement of claimant's current disability. Id. at *9.

Neither case is on all fours with the present case. In the current case, the claimant voluntarily left his employment with the defendant employer so there is a termination unlike in the Raley case. Further, claimant never returned to the same or similar wages with the defendant as the injured worker did in Pavlich.

Claimant was offered light duty work at a same or similar wage. In McCoy v. Menard, the Commissioner set forth a guide that the injured worker must be offered same or higher wages and commensurate hours so that the overall earnings post injury were the same or higher than pre-injury. McCoy v. Menard, Inc. No. File No. 1651840, 2021 WL 2624688, at *3 (Apr. 9, 2021).

However, light duty work is a stop gap and defendant's witness testified that the current positions open to the claimant were his pre-injury position. Further, the defendants had positions open at a same or similar wage but the last offer of employment was the temporary light duty work. Ms. Mortale, the Human Resources Manager for PDI, did not offer testimony that claimant was made an offer for part-time warehouse selectors or order pickers. Thus, while claimant may have refused as he was out of state and pursuing different employment, the record does not contain an actual offer of employment at the same or higher salary or wages even if he could work the same type of job as he worked prior to his injury at the same or higher salary or wages. The offer must exist before the employer can benefit from Iowa Code section 85.34(2)(v).

The record also does not contain evidence that claimant is earning a wage or an overall earning package at the same or similar level to his pre-injury even though that is by claimant's own choice. I do not find case law to hold that voluntarily opting not to return to work at the same or higher pre-injury salary or wages requires the imposition of Iowa Code section 85.34(2)(v) as the code limits application to when the employee "returns to work" or "is offered work." Iowa Code section 85.34(2)(v). Neither triggering event has occurred here. Claimant neither returned to work nor was he offered work at the same or higher salary or wages as he earned at the time of his injury.

Because claimant was not offered work at the same or similar wage and because claimant had terminated his employment and still has not earned a same or similar wage as his pre-injury employment, it is found that Iowa Code section 85.34(2)(v) does not apply and claimant's disability shall be measured as an industrial loss.

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 the terms of percentages of the total physical and mental ability of a normal man."

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

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The FCE conducted placed claimant in the heavy work category. As a result, Dr. Yankey assigned minimal work restrictions recommended by the FCE evaluator. These included lifting up to 75 pounds from floor to waist occasionally; lifting up to 50 pounds from waist to shoulder occasionally; lifting up to 40 pounds overhead occasionally; bilateral carrying up to 80 pounds occasionally; and horizontal pushing/pulling up to 64.5 pounds of force occasionally. Claimant could return to his pre-injury employment within these work restrictions. Dr. Bansal's opinions did not include work restrictions.

Claimant testified that he is now living on a 100-acre plot of land, building a home, and caring for his family of 8 children. While his earnings are lower compared to when he worked part-time for the defendant employer, this seems to be a personal choice. Claimant's unrebutted FCE places him in the heavy work category and within that work category are positions such as his pre-injury position that allows him to earn same or similar wages post-injury as pre-injury.

Claimant testified that he would not be able to return to the fast-paced, physically laborious position as a selector or product picker with defendant employer. The ability to build a home, care for 100 acres, watch over and care for 8 children also requires physical labor. This is not consistent with his self-reported physical limitations recorded in Dr. Bansal's notes. Claimant maintained he was limited to 10 minutes of walking a day and could not carry his one year old daughter for long periods of time. However, Dr. Yankey's opinions that claimant's restrictions are related to pre-existing conditions also are not aligned with claimant's consistent reports of pain since the aggravating incident of July 2, 2020.

The substantial evidence supports a finding that claimant has sustained an aggravation of a pre-existing lumbar condition. This aggravation has necessitated conservative medical care and therapy. Claimant was offered various times more aggressive medical care in the form of injections or prescription medications but refused. Physical therapy helped to alleviate claimant's pain and provide more function, however, he has not returned to his pre-injury baseline. While claimant is placed in the heavy work category as a result of his FCE, there are still some restrictions on his ability to work and thus, some loss of industrial disability.

Claimant does not appear motivated to re-enter the mainstream work force. He does have experience teaching English and has the intelligence for job retraining. He is a younger worker, under the age of forty. Based on the foregoing as well as the valid FCE, the claimant's current work environment which appears to be light farm duties and child care, and his physical presentation at his last examination of March 26, 2021, it is found claimant has sustained a 15 percent industrial loss.

Section 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 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).

The commencement date of permanent partial disability benefits is February 3, 2021, the date upon which he was seen by Dr. Bansal. He did not have any additional care after that date including but not limited to physical therapy. There was no significant further improvement medically anticipated on February 3, 2021. Defendants argue that the commencement date should be the March 11, 2021, examination with Dr. Yankey because claimant's leg and low back pain seemed to have improved at that visit. However, a close examination of the medical records show a waxing and waning of claimant's pain symptoms. The pain symptoms would increase or flare up with activity and decrease during periods of lower activity. Thus, February 3, 2021, is appropriate as the date after which no significant further improvement is medically anticipated.

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

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

Both parties agree that claimant was a part-time worker for defendant employer. Ms. Mortale testified that claimant worked, on average, 10 to 20 hours per week. He testified that he worked part-time, approximately 20 hours per week. Claimant seeks to exclude weeks where he worked less than 10 hours per week or earned "other" pay. Based on the testimony of Ms. Mortale who testified claimant averaged 10 to 20 hours a week and claimant's testimony that he worked an average of 20 hours per week, a week in which he worked less than 10 hours would not be representative. Therefore,

claimant's benefit rate calculation is adopted. Claimant's gross earnings were $455.80 per week and as a married person with 10 exemptions, his weekly benefit rate would be $273.13.

Claimant also seeks alternate care.

As claimant is seeking relief in this case, claimant bears the burden of proof to show by a preponderance of the evidence that the offered medical treatment is not reasonably suited to treat the injury without undue inconvenience to the employee. See Lawyer and Higgs, Iowa Practice, Workers' Compensation, §15-4 and cases cited therein.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997). Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, this 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 therefore, allow and order other care.

The question of reasonable care is a question of fact. An application for alternate medical care is not granted simply because the employee is dissatisfied with the care the employer has chosen. Mere dissatisfaction with the care is not sufficient grounds to grant an application for alternate medical care. The employee has the burden of proving that the care chosen by the employer is unreasonable. Unreasonableness can be established by showing 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. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Long v. Roberts Dairy Company, 528 N.W. 2d 122 (Iowa 1955). Unreasonableness can be established by showing that the care authorized by the employer has not been effective and is "inferior or less extensive" than other available care requested by the employee. Pirelli-Armstrong, at 437.

In the present case, the record does not support that there was proferred care that the claimant felt was not reasonably suited to treat the injury or that was unduly inconvenient for the claimant. As a threshold matter, dissatisfaction of the proferred care must be communicated to the defendant employer. There is no testimony or written documentation that the claimant was unhappy with the care being proferred. In fact, claimant turned down care such as prescription medications and injection therapy on multiple occasions.

The claimant did not carry his burden in showing any elements of an alternate care claim. Thus, no alternate care is ordered herein.

The final issue is whether claimant is entitled to reimbursement of the IME of Dr. Bansal.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendants argue that there was no triggering initial evaluation. Dr. Bansal's examination took place on February 3, 2021, thus the low evaluation must take place at some point preceding that date. Claimant saw Dr. Yankey on January 5, 2021, wherein Dr. Yankey imposed work restrictions consistent with the FCE evaluation. However, Dr. Yankey did not issue a permanent impairment rating nor did Dr. Yankey give any opinion about whether claimant was at MMI. Thus, claimant did not meet the burden of proving that there was an employer-retained physician evaluation on permanent disability that was too low prior to the examination of Dr. Bansal.

Reports are covered in Iowa Administrative Code rule 876 4.33 wherein a party can request that costs be taxed by the deputy to a prevailing party. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs 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, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially

> paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Pursuant to DART v. Young, section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and the expense of the examination is not included in the cost of a report. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846–47 (Iowa 2015) A report can be reimbursed as a cost. Claimant is requesting a reimbursement of costs but there is no itemized list of costs or proof of payment submitted. No bill of Dr. Bansal was submitted to separate the report from the examination. No costs are awarded.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred seventy-three and 13/100 dollars ($273.13) per week from February 3, 2021.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That the parties shall each pay their own costs.

Signed and filed this __6th__ day of December, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Mattson (via WCES)
Lindsey Mills (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.