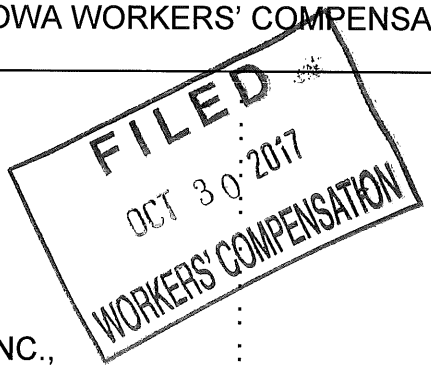
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



STEVEN PLEW, JR., Claimant, vs. AJS OF DES MOINES, INC., Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5056490 ARBITRATION DECISION Head Notes: 1108, 1402.30, 1402.40, 1802, 3001, 3002

Claimant Steven Plew filed a petition in arbitration on April 12, 2016, alleging he sustained injuries to his back, right hip, and right knee while working for the defendant, AJS of Des Moines, Inc., d/b/a Service Master ("Service Master"). Service Master and its insurer, the defendant Accident Fund General Insurance Company ("Accident Fund") filed an answer on May 4, 2016, denying Plew had sustained a work injury.

An arbitration hearing was held on May 24, 2017, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Jean Mauss represented Plew. Plew appeared and testified. Cathy Curtis appeared and testified on behalf of Plew. Attorney Laura Ostrander represented Service Master and Accident Fund. Joan Hitzel appeared and testified on behalf of Service Master and Accident Fund. Joint Exhibits ("JE") 1 through 9, and 11 through 23 were admitted into the record. The record was held open through June 26, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Service Master and Accident Fund waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Service Master and Plew at the time of the alleged injury.

2. Although entitlement to temporary benefits cannot be stipulated, Plew was off work from February 16, 2016 through May 31, 2016, and June 1, 2016 through June 26, 2016.

3. If Plew has sustained a permanent disability, the disability is an industrial disability.

4. If Plew has sustained a permanent disability, the commencement date for permanent partial disability benefits is June 27, 2016.

5. At the time of the alleged injury Plew was single and entitled to two exemptions.

6. Although disputed, the medical providers would testify as to the fees and/or treatment set forth in the listed expenses and the defendants are not offering contrary evidence.

7. Although a causal connection of the expenses to the work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.

8. The costs listed in Exhibit 23 have been paid.

ISSUES

1. Did Plew sustain an injury on February 8, 2016, which arose out of and in the course of his employment with Service Master?

2. Did the alleged injury cause a temporary disability during a period of recovery?

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

4. Is Plew entitled to temporary benefits from February 16, 2016 through May 31, 2016, and June 1, 2016 through June 26, 2016?

5. What is the extent of Plew's disability?

6. What is Plew's rate?

7. Is Plew entitled to recover medical expenses?

8. Should penalty benefits be awarded to Plew?

9. Is Plew entitled to recover the cost of an independent medical examination?

10. Should costs be assessed against either party?

FINDINGS OF FACT

Plew lives in Des Moines, Iowa, with his girlfriend, Curtis, their daughter, and Curtis's other child. (Tr., p. 13; JE 16, pp. 115-16) Plew is a high school graduate. (Tr., p. 23; JE 16, p. 116) Plew attended one semester at AIB following high school, but he has not attended any other training. (Tr., p. 24; JE 16, p. 116) Plew is a smoker. (JE 2, p. 16) At the time of the hearing Plew was forty-seven. (Tr., p. 23)

Plew has experience working as a machine operator, carpet cleaner, furniture cleaner, seasonal manager of a stable, roofer, laborer, furniture delivery worker, technician, and delivery route driver. (JE 6, pp. 58-60; JE 16, p. 117-18; Tr., p. 24)

Service Master hired Plew on January 30, 2013, as a full-time technician. (JE 6, p. 60; JE 18, p. 158; Tr., pp. 26-27) Plew previously worked for Service Master as a technician from 1997 through 2000. (JE 6, p. 59; Tr., p. 25) Service Master provides fire and water restoration, furniture and carpet cleaning, and rug cleaning services. (Tr., pp. 26-27; JE 16, pp. 118, 121; JE 17, p. 138) As part of his duties as a technician Plew tears out drywall and flooring. (Tr., p. 24) Plew is responsible for moving furniture in and out of homes and in and out of the shop, carrying wet carpet, carrying drying equipment, including fans and dehumidifiers, and carrying an upholstery machine. (Tr., p. 28) Plew spends approximately thirty percent of his time working on water or fire damage duties, and the remainder of his time working on routine cleaning. (Tr., pp. 57-58)

Before he returned to Service Master in 2013, Plew worked for Firestone, as a machine operator. (Tr., pp. 24-25, 58) Plew was terminated from Firestone after he failed a random drug test that was positive for marijuana. (Tr., pp. 24-25)

Plew works for Service Master during the day and he is on-call for one week, twenty-four hours per day, every four weeks. (Tr., p. 26) When he is on-call Plew receives $50.00 for the week, and time and a half pay after hours. (Tr., p. 27)

Plew testified he received a $2,000.00 bonus in 2016, a $2,000.00 bonus the year before, and a $2,500.00 bonus the year before that. (Tr., pp. 27-28) Hitzel, the human resources coordinator for Service Master testified the bonuses are paid at the owners' discretion, and she is uncertain if bonuses are paid every year and in the same amount. (Tr., pp. 77, 81-82)

Plew testified that on February 8, 2016, at around 3:30 p.m.,

> I was carrying an air mover fan. We were using the walkout basement in the yard, because it was a sewer backup in the basement and we were trying to carry all the nasty stuff out through the back door and not track it through the house. And there was snow in the backyard with a slight hill going towards the back door. When I was walking down the hill with a fan

> in my hand, my right foot slipped down the hill, and then it slipped out to the right.

(Tr., pp. 29-30) Plew reported, "I just felt like a weird pain in my knee. I didn't fall down. I kind of caught myself, so it was kind of a jerk. I mean, I kind of jerked when I tried to catch myself." (Tr., pp. 29-30) Plew described the pain in his knee as "some kind of a pull." (Tr., p. 30) Plew was carrying the air mover which weighed approximately twenty-five pounds in his right hand. (Tr., p. 30)

Plew testified that he had a difficult time getting down on the floor to cut out the carpeting and he could not do it, so his coworker, Enrique, finished cutting out the carpet. (Tr., p. 31) Plew finished his duties that day around 6:00 p.m. (Tr., p. 30) Plew testified he went home and iced and elevated his knee. (Tr., p. 31) Plew denied that he experienced any injuries to his back before February 2016. (Tr., p. 29)

During his deposition on March 6, 2017, Plew reported on February 8, 2016, around 3:30 p.m., "we were using the walkout basement doors and slight hill in the backyard, had snow on it. And I was carrying an air mover, a fan in one hand. When I went down the hill, my foot slipped slightly downhill and out to the right walking going down the hill" of the residence". (JE 16, p. 123)

A photograph of the home where Plew was working on February 8, 2016, shows snow on the ground, including on the edges of the pavement in the front of the home. (JE 17, p. 146) Plew did not immediately report his work injury to Service Master.

Plew's girlfriend, Curtis, is a high school teacher with the Des Moines Public Schools. (Tr., p. 13) Curtis testified Plew called her and told her he had slipped at work on February 8, 2016. (Tr., pp. 15-16) Curtis relayed that evening when she arrived home from work Plew was lying in bed, which was not normal, and he had ice on his back and lower back. (Tr., p. 15) Curtis's recollection differs from Plew's recollection. Plew testified he iced his knee, not his back.

The next day, February 9, 2016, Plew returned to work and performed his normal job duties. (Tr., p. 32) Plew testified he had some discomfort in his back. (Tr., p. 32)

Curtis reported that between February 8, 2016 and February 10, 2016, Plew could not do his normal duties at home and he was in bed icing his back and taking ibuprofen. (Tr., p. 16)

Plew also returned to work on February 10, 2016, but he left work early around noon, to go to the doctor. (Tr., pp. 32-33) Plew requested permission to leave work from Pat Pollard, his supervisor and project manager. (JE 17, p. 138) Plew testified he told Pollard his knee and back were killing him and he needed to go to the doctor. (Tr., p. 33)

Pollard recalled Plew came up to him and told him he had hurt himself and Pollard told him that if it was a work-related injury he "must fill out a work accident

report." (JE 17, p. 139) Pollard testified Plew turned and walked away without filling out an accident report. (JE 17, p. 139) Plew relayed the pain "was working its way up my legs, and that was when my right hip started hurting, as well as my back, my lower right back and my right hip." (Tr., p. 33)

On February 10, 2016, Plew attended an appointment with Christina Collins, PA-C, with UnityPoint Clinic Urgent Care Southglen ("UP Southglen"). (JE 2, page 6). Collins documented Plew reported pain from his right hip down to the outside of his knee for one week, weakness, and he thought he "twisted his knee on ice." (JE 2, p. 6) Collins assessed Plew with right-sided low back pain with sciatica, administered a Toradol injection, and prescribed cyclobenzaprine and naproxen. (JE 2, pp. 6-7) Plew estimated the appointment lasted five minutes. (Tr., p. 74)

Plew testified Collins's documentation that the pain had been going on for one week is incorrect. (Tr., p. 61) Plew agreed that during the appointment he did not inform Collins he injured himself at work. (Tr., p. 61)

Plew took paid time off February 11th and 12th. (Tr., p. 35) Plew returned to work on the 15th, but he was unable to complete his workday and left before lunch. (Tr., pp. 35-36) Plew testified he told Roovart he was having severe back, knee, and hip pain "due to the slip in the snow at the job on the 8th." (Tr., p. 36) Plew relayed Roovart responded that he had heard Plew hurt himself shoveling snow and Plew reported that was not what happened "that I slipped in the snow at the job site on the 8th." (Tr., p. 36) Plew stated that Roovart walked away. (Tr., p. 36) Plew testified that night he was up all night in pain. (Tr., p. 36) Plew did not return to work until June 1, 2016, after his surgery. (Tr., pp. 45-46)

Roovart is the general manager and partner of Service Master. (JE 18, p. 157) Roovart testified Plew is a good employee who works well with others and customers, he is dependable and punctual. (JE 18, p. 158) Roovart relayed Plew had missed a few days of work and recalled Fusaro had reported Plew hurt himself shoveling snow. (JE 18, p. 158) Roovart testified Service Master learned about Plew's work injury after Plew reported it to Hitzel. (JE 18, p. 160) Roovart testified he could not recall if Plew reported the work injury to him, and responded "[i]f he came and told me that he had injured himself, I would have sent him to Joan. So did he go to Joan or did I tell him to, I don't remember." (JE 18, p. 161)

Plew returned to UP Southglen on February 16, 2016. (JE 2, p. 8) Adam Bjornson, PA-C, examined Plew and documented Plew walked with a "mild limp" and complained of ongoing right leg and right hip pain with difficulty sleeping. (JE 2, p. 9) Bjornson noted Plew reported his "[s]ymptoms started after he was shoveling snow and slipped and strained his right hip" and noted Plew denied having back pain. (JE 2, p. 9) Bjornson referred Plew to physical therapy, prescribed Norco for pain, and provided Plew with home exercise instructions. (JE 2, pp. 9-11) Plew estimated the appointment lasted ten minutes. (Tr., p. 74) Plew denied that he told Bjornson that he injured himself shoveling snow. (Tr., p. 63)

Curtis attended the appointment with Bjornson, and denied she and Plew told Bjornson his "symptoms started after he was shoveling snow and slipped and strained his right hip." (Tr., p. 18) Curtis testified Bjornson was not taking notes during the appointment, and Plew told Bjornson he had slipped on the snow at work. (Tr., p. 18)

During Plew's first physical therapy appointment on February 17, 2016, the physical therapist documented in the history of injury/condition section Plew has "a history of previous sciatic episodes that resolved. Fell on ice a few days ago and now has severe low back pain with sciatica in the R. LE." (JE 3, p. 22) Under the subjective section of the report the physical therapist documented, "[p]atient reported that he fell on ice and now has severe low back pain with sciatic pain down the R leg. Patient stated that he did not work on last Friday (2/12/16). Patient reported hx of mild sciatic pain [sic] the past that resolved with stretching and rest." (JE 3, p. 22) Plew testified he did not recall making the statement because he had never had sciatic issues before. (Tr., p. 66) Plew reported that he did not know what the physical therapist was referring to regarding the stretching. (JE 16, p. 126) The physical therapist also documented Plew relayed he fell on the ice a couple of days ago. (Tr., p. 67) Plew denied saying that and recalled he reported he had slipped. (Tr., p. 67)

Plew returned to UP Southglen on February 22, 2016, and Chad Enich, PA-C examined him. (JE 2, p. 12) Enich documented Plew presented with a two-week history of pain in his lower lumbar spine and right lower extremity, radiating down the right side, which he "related to a specific injury slipped at work," without weakness, paresis or paralysis. (JE 2, p. 12) Enich prescribed prednisone, administered a Toradol injection, continued Plew's Norco, and ordered lumbar spine magnetic resonance imaging. (JE 2, p. 14)

Fusaro has been a project manager for Service Master for twenty-six years, and served as the on-call manager for a period of time. (JE 19, pp. 179-80) Fusaro supervises all of the employees. (JE 19, p. 179) Fusaro reported Plew is a good employee. (JE 19, p. 179)

Fusaro testified he heard Plew had reported he injured himself carrying fans. (JE 19, p. 180) Fusaro reported he told Roovart, "[t]hat's funny . . . . A week and a half ago he hurt his back shoveling snow." (JE 19, p. 181) During his deposition on April 17, 2017, Fusaro testified:

> Well, the only thing I have to say over this situation is it was a week and a half before this incident transpired. We had a snow event, and we were actually on call and he came in kind of lumped a little bit, kind of moving a little slower than he normally would. I pick up on these things with the employees, so I just asked him, "Oh, you didn't get any sleep last night?" He says, "No, I tweaked my back shoveling snow." I said, "Yeah, I did too. That's a lot of snow to move, wasn't it?" And he said, "Yeah." That's it.

> That was our conversation that had to do with anything. It didn't have – to me it was just a conversation.

(JE 19, p. 180)

Fusaro also signed an affidavit on March 27, 2017, which provides"[o]ne morning, approximately one to two weeks before Steven Plew alleged a work injury, I saw Steven Plew dragging and asked him what was bothering him. He replied that he had been shoveling snow at home and injured his back." (JE 15, p. 114) Fusaro is related to Roovart through marriage. (Tr., pp. 44, 86) Plew denied that he told Fusaro that he injured himself shoveling snow at his home. (Tr., pp. 41, 72) Plew testified he is not aware of any reason why Fusaro would fabricate a story that he injured himself shoveling snow. (Tr., p. 72)

Plew testified Fusaro's recollection is flawed. During the hearing Plew testified he was not on-call on February 2, 2016. (Tr., p. 41) Plew is on-call one week every four weeks and testified he was scheduled to be on-call February 12, 2016, and when he called in sick Fusaro was upset and responded, "You're supposed to be on-call." What am I going to do now? (Tr., pp. 42-43) Plew testified there was nothing that occurred between February 2, 2016 and February 8, 2016, that caused him difficulty with work or caused him to move slower than normal. (Tr., pp. 43-44)

Curtis testified Plew operates a snow blower to remove snow and she uses a shovel to remove snow from their home. (Tr., pp. 14, 21) Curtis denied that Plew has ever shoveled snow in the seventeen years she has been with him. (Tr., pp. 14-15, 21-22)

At hearing Hitzel recalled her coworker received a call from Steve in mid-February for approval of magnetic resonance imaging, and she was not aware of any work-related injury that might require imaging, so she spoke with Pollard because the owners of Service Master were out and Pollard

> said that Steve had mentioned to him that he had hurt his back on a sewer job, and he had told Steve to fill out an accident report, but no report had been filled out. Pat Fusaro overhead that conversation and came in and joined it and said well, Steve had told him that he was off because he had hurt his back shoveling snow. So at that point I didn't know if it was work-related or if it was related to something he did at home.

(Tr., pp. 79-80)

During her deposition in April 2017, Hitzel testified she first received knowledge of Plew's alleged work injury when she "had a phone message from Steven that he needed approval from the insurance company for an MRI and the doctor wanted to know if it was a workers' comp claim. I was not aware of any accident, and I told him I

did not have the authority to give that approval." (JE 20, p. 187) Hitzel reported she went to see Roovart, but he was not there, so she spoke with Pollard and Pollard said "Steve had told him that he was injured on a job earlier in the month, and Pat had told him to turn in an accident report, but I never received the accident report." (JE 20, p. 188) Hitzel further testified as she was speaking with Pollard, Fusaro overheard the conversation and came over and said, "Steve had told him that he injured his back shoveling snow at his home earlier in the month," so she contacted Plew and told him he needed to fill out an accident report before a decision could be made regarding the magnetic resonance imaging. (JE 20, p. 188) Plew asked if Fusaro could bring it to him, and she gave the form to Fusaro and he returned it to her. (JE 20, p. 188)

Plew had taken paid time off on February 2, 2016, due to snow. (Tr., pp. 83-84; JE 20, pp. 190, 197, 202) Weather records showed the Des Moines International Airport received 2.5 inches of snowfall on February 2, 2016. (JE 11, p. 77) Plew acknowledged that in the days prior to February 8, 2016, he received snow at his home that he moved with his snow blower. (Tr., p. 71) Plew denied telling Pollard he injured himself shoveling snow at home. (Tr., p. 72) Plew reported that he had differences with Pollard in the past. (Tr., p. 72)

Fusaro dropped off an incident report to Plew's home on February 22, 2016, after work. (Tr., p. 37, 65) Plew filled out the report that day. (Tr., p. 37) Plew reported he took so long to report his work injury because he thought "it was a slight strain" and testified Roovart knew about the accident on February 15, 2016. (Tr., pp. 60-61)

On March 1, 2016, Plew attended an appointment with Bjornson at UP Southglen. (JE 2, p. 16) Bjornson documented Plew had been attending physical therapy and reported a slight improvement, but he complained of significant discomfort at night, when walking, and with flexion and use of his right leg. (JE 2, p. 17) Bjornson documented Plew was walking with a "slight limp," and he restricted Plew from working until magnetic resonance imaging was conducted. (JE 2, pp. 17-19)

Plew testified he called Roovart on March 4, 2016, "at work to let him know how things were going, and that was when I asked him if the paperwork was being held up, because somebody was saying that I hurt myself shoveling snow. And that was when he told me that that was the story he got from a reliable source, but he didn't tell me who that was." (Tr., p. 40) Plew reported he was upset and told Roovart he would take a lie detector test and Roovart replied they were not going to offer one because it cost $1,200.00. (Tr., p. 41)

Accident Fund sent Plew a letter on March 17, 2016, notifying him that following an investigation, Accident Fund had decided to deny his claim because it believed his injury did not occur within the course of his employment. (JE 8, p. 70)

On April 20, 2016, Plew attended an appointment with David Hatfield, M.D., an orthopedic surgeon. (JE 3, p. 28; JE 4, p. 32a) Dr. Hatfield documented Plew complained of back, right buttock, and right leg pain since "a slip on the snow at a

residential job site" on February 8, 2016. (JE 3, p. 28; JE 4, p. 32a) Plew reported the pain is constant, sharp and throbbing in nature, and is worse in the morning and at night, with sitting, walking, and bending. (JE 3, p. 28; JE 4, p. 32a) Dr. Hatfield ordered and reviewed x-rays, which he found revealed lordosis and degenerative changes at L5-S1. (JE 4, p. 33) Plew did not check he had a work-related injury on the patient history form. Plew testified he did not check that because his workers' compensation claim had already been denied. (Tr., p. 68)

Dr. Hatfield noted magnetic resonance imaging from April 8, 2016, shows

> [m]odic changes L4-5. Minimal bilateral fifth root foraminal narrowing. Slight right fourth root foraminal narrowing. Very large right L3-4 disc extrusion with caudal migration. Axial projection moderate L3-4 stenosis with very large L3-4 disc extrusion with caudal migration with resultant high grade stenosis and marked right-sided fourth root compression. Right greater than left later recess narrowing L4-5. A component of epidural lipomatosis L5-S1.

(JE 4, p. 33) Dr. Hatfield recommended surgical intervention to address the right L4-5 lateral recess stenosis and a right L3-4 disc extrusion. (JE 4, p. 33) Dr. Hatfield performed a right L5 decompression and a right L4 discectomy on April 27, 2016. (JE 4, 37)

Following surgery Plew complained of numbness and tingling in his right leg and toes. (Ex. 4, p. 39) Dr. Hatfield released Plew to return to work on June 1, 2016, with a thirty pound lifting restriction, half days until June 15, 2016, with sitting and standing as tolerated. (Ex. 4, p. 40)

On June 27, 2016, Plew attended a follow-up appointment with Dr. Hatfield, complaining of some pain in the dorsum of his right foot. (JE 4, p. 41) Dr. Hatfield imposed a forty-five pound lifting restriction until July 31, 2016, with a release without restrictions after that date, and released him from care. (JE 4, pp. 41-42)

The attorney for Service Master and Accident Fund requested an opinion letter from Dr. Hatfield. Dr. Hatfield sent a letter on January 20, 2017, noting he had performed a right L4 discectomy with right L5 decompression on April 22, 2016, and he released Plew on July 31, 2016 without restrictions. (JE 4, p. 43) Dr. Hatfield opined the intake packet indicated Plew had reported a February 8, 2016 slip on snow at a residential job site and "[i]f records indicate the same or similar symptoms predating incident as described I would be unable to state with a degree of medical certainty regarding causation." (JE 4, p. 43) Using Section 15.4, Example, 15-3, page 386 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Hatfield assigned Plew a ten percent impairment of the whole person. (JE 4, p. 43)

Plew retained Sunil Bansal, M.D., an occupational medicine physician, to perform an independent medical examination in March 2017. (JE 5) Dr. Bansal reviewed Plew's medical records and examined him. (JE 5) Dr. Bansal diagnosed Plew with status post right L5 decompression and right L4 discectomy, right hip pain related to back pathology, and right knee pain related to back pathology. (JE 5, pp. 50-51) Dr. Bansal noted Plew had slipped down and out to the side while walking through snow across a hilly back yard while carrying a twenty-five pound fan, noting "[t]he above mechanism of a near fall involves violent torsion to the body. Coupled with his clinical presentation of radicular lower back pain, this is consistent with his acute L4-L5 disc extrusion and need for surgery." (JE 5, p. 51) Dr. Bansal placed Plew at maximum medical improvement on June 27, 2016, the date he was released from care by Dr. Hatfield. (JE 5, p. 51)

Using Table 15-3 of the AMA Guides, Dr. Bansal assigned a ten percent impairment to the body as a whole. (JE 5, p. 52) Dr. Bansal recommended restrictions of lifting sixty pounds occasionally and thirty pounds frequently, no frequent bending or twisting, to avoid sitting for longer than sixty minutes at a time, and to avoid frequent stairs. (JE 5, p. 52)

Curtis testified that since his work injury Plew has not been able to get onto the floor and play with her daughters like he used to or give piggyback rides. (Tr., p. 19) Curtis reported that since his work injury Plew is more "rigid" than he used to be and does not walk with a "fluid, easygoing motion." (Tr., p. 20) Curtis reported that her oldest daughter has to help Plew tie his boots when he is in pain. (Tr., p. 2)

Plew testified repetitive lifting aggravates his back. (Tr., p. 49) Plew noted that he had one week of lifting a lot of heavy, wet carpet, and it seemed to aggravate his back. (Tr., p. 49) Plew reported if something is going to be too heavy he asks someone else to lift it or to help. (Tr., p. 49)

Plew relayed Dr. Hatfield told him he should not exceed fifty pounds, and to be cautious. (Tr., p. 49) Plew testified "[t]oo many stairs makes my knee kind of wobbly, and it just isn't feel as stable as it did prior" and his right leg gets sore and stiff when he squats. (Tr., p. 50) Plew relayed his problems are with walking up steps. (Tr., p. 50) Plew tries not to sit or stand in one place for more than an hour because he becomes stiff. (Tr., p. 51) Plew takes ibuprofen for pain three to four times per week. (Tr., p. 51) Plew reported that his right foot feels cold all the time, is stiff, and it tingles and feels numb. (Tr., p. 48) Plew relayed his back condition is better now, if he does not overdo it. (Tr., p. 48)

Plew testified he used to golf and since his injury he has not golfed, and he cannot give the girls piggyback rides. (Tr., p. 54) Plew acknowledged that he does not have any work restrictions. (Tr., pp. 68-69) At the time of the hearing Plew continued to work full-time for Service Master and he was on-call one week, every four weeks. (Tr., p. 68)

CONCLUSIONS OF LAW

I. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> It is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (Emphasis in original).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

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).

Plew alleges he sustained injuries to his lumbar spine, right knee, and right hip while working for Service Master. Service Master and Accident Fund reject his assertion, and contend Plew's alleged injuries did not arise out of and in the course of his employment with Service Master.

Plew testified at hearing he sustained injuries to his lumbar spine, right knee, and right hip on February 8, 2016, when he slipped on a snowy hill of a customer's home while carrying an air mover fan. (Tr., pp. 29-30) Fusaro testified in his deposition a week and a half before the alleged work injury Plew told him he had tweaked his back shoveling snow. (JE 19, p. 180) Plew denies making the statement. This raises an issue of credibility.

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). During the hearing I did not observe Plew engage in any furtive or suspicious movements, his eye contact was appropriate, and his rate of speech was appropriate. Fusaro did not testify at hearing, so I could not observe his nonverbal and verbal conduct.

Fusaro's deposition testimony differs from his affidavit. (JE 15; JE19) In his affidavit, Fusaro affirmed his conversation with Plew occurred one to two weeks before the alleged February 8, 2016 work injury. (JE 15; JE 19) During his deposition, Fusaro reported the conversation occurred a week and a half before the alleged February 8, 2016 work injury. The snow event Service Master and Accident Fund have focused on occurred on February 2, 2016, less than a week before the alleged work injury.

Plew testified Fusaro's recollection is flawed. During the hearing Plew testified he was not on-call on February 2, 2016. (Tr., p. 41) Plew is on-call one week every four weeks and testified he was scheduled to be on-call February 12, 2016, and when he called in sick Fusaro was upset and responded, "what am I going to do now? You're supposed to be on-call." (Tr., p. 43) Service Master and Accident Fund did not submit any contrary evidence at hearing contradicting Plew's testimony that he was not on-call February 2, 2016. The record supports Plew was on-call for one week, every four weeks.

Curtis testified at hearing Plew operates a snow blower to remove snow and she uses a shovel to remove snow from their home. (Tr., pp. 14, 21) Curtis denied that Plew has ever shoveled snow in the seventeen years she has been with him. (Tr., pp. 14-15, 21-22) During the hearing I did not observe Curtis engage in any furtive or suspicious movements, her eye contact was appropriate, and her rate of speech was appropriate. I found Curtis to be a credible witness.

Plew's testimony at hearing and during his deposition was consistent concerning the circumstances of the alleged work injury. (JE 16, p. 123; Tr., pp. 29-30) During his initial medical appointment with Collins at UP Southglen on February 10, 2016, Collins documented Plew was complaining of pain from his right hip down to the outside of his knee for one week, with weakness, and that he thought he had "twisted his knee on the ice." (JE 2, p. 6) Plew estimated the appointment lasted five minutes. (Tr., p. 74)

Plew returned to UP Southglen on February 16, 2016. (JE 2, p. 8) Bjornson documented Plew reported his "[s]ymptoms started after he was shoveling snow and slipped and strained his right hip" and noted Plew denied having back pain. (JE 2, p. 9) Bjornson referred Plew to physical therapy, prescribed Norco for pain, and provided him with home exercises for sciatica. (JE 2, pp. 9-10) Plew's medical records document ongoing complaints with his back.

Curtis attended the appointment with Bjornson, and denied she and Plew told Bjornson his symptoms started after he was shoveling snow and slipped and strained his right hip. (Tr., p. 18) Curtis testified Bjornson was not taking notes during the appointment, and Plew told Bjornson he had slipped on the snow at work. (Tr., p. 18)

During Plew's first physical therapy appointment on February 17, 2016, the physical therapist documented in the history of injury/condition section Plew "has hx of previous sciatic episodes that resolved. Fell on ice a few days ago and now has severe low back pain with sciatica in the R. LE." (JE 3, p. 22) Under the subjective section of the report the physical therapist documented, "[p]atient reported that he fell on ice and now has severe low back pain with sciatic pain down the R leg. Patient stated that he did not work on last Friday (2/12/16). Patient reported hx of mild sciatic pain [sic] the past that resolved with stretching and rest." (JE 3, p. 22) Plew testified he did not recall making the statement because he had never had sciatic issues before. (Tr., p. 66) Plew reported that he did not know what the physical therapist was referring to regarding the stretching. (JE 16, p. 126) The physical therapist also documented Plew relayed he fell on the ice a couple of days ago. (Tr., p. 67) Plew denied saying that and recalled he reported he had slipped. (Tr., p. 67)

Plew's initial appointments were with Collins and Bjornson at the urgent care clinic. Plew's testimony has been consistent concerning the mechanism of his work injury. I also found Curtis to be a credible witness. Fusaro did not testify at hearing and I could not make similar credibility determinations concerning his appearance and demeanor. Plew has established he sustained an injury on February 8, 2016, arising out of and in the course of his employment with Service Master.

II. Nature and Extent of Disability

Plew alleges he sustained permanent impairments to his lumbar spine, right knee, and right hip. Service Master and Accident Fund deny his assertion.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

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).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Two physicians examined Plew, Dr. Hatfield, the treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician retained to conduct an independent medical examination for Plew. Using the AMA Guides Drs. Hatfield and Bansal both agreed Plew has sustained a ten percent permanent impairment to the body as a whole. (JE 4, p. 43; JE 5, p. 52) Neither Dr. Hatfield nor Dr. Bansal provided any impairment rating for Plew's right knee or right hip. Plew has not established he sustained any

permanent right knee and right hip injuries as a result of or sequelae injuries of the February 8, 2016 work injury.

At the time of the hearing Plew was forty-seven. (Tr., p. 23) Plew has graduated from high school and attended one semester at AIB following high school. (Tr., p. 24; JE 16, p. 116) Plew did not testify he has any problems learning new concepts. Plew returned to his normal duties with Service Master following surgery. Plew is unable to golf, and his activities with his child and his girlfriend's other child have been impacted by his work injury. Considering Plew's functional disability, age, education, qualifications, experience, ability to engage in similar employment, and all factors of industrial disability, I conclude Plew has sustained a fifteen percent industrial disability.

III. Healing Period Benefits

Plew seeks to recover temporary total disability benefits from February 16, 2016 through May 31, 2016, and temporary partial disability benefits from June 1, 2016 through June 26, 2016. In its brief Service Master alleges Plew did not sustain an injury arising out of and in the course of employment.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). 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 loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. The record supports Plew has sustained permanent impairment to his lumbar spine as a result of the work injury. If Plew is entitled to additional temporary benefits, he is entitled to healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee 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.

The parties stipulated Plew was off work February 16, 2016 through May 31, 2016, and June 1, 2016 through June 26, 2016, and that the commencement date for permanent partial disability is June 2017. Pursuant to the stipulation of the parties, Plew is entitled to healing period benefits from February 16, 2016 through May 31, 2016 and June 1, 2016 through June 26, 2016.

IV. Rate

The parties have stipulated that at the time of the alleged injury Plew was single and entitled to two exemptions, but disagree upon the rate. Plew avers at the time of the alleged injury his gross earnings were $755.89 per week. Service Master and Accident Fund contend his gross earnings were $668.07 per week.

At the time of his work injury Plew earned $16.00 per hour. Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using the last thirteen consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen

> consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. The statute defines "gross earnings" as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5)

A. Inclusion of Bonus Income

In his post-hearing brief Plew alleges his rate should include a bonus of $2,200.00 from December 15, 2015, and a second bonus of $2,200.00 from December 15, 2015. Service Master and Accident Fund aver the bonus income should not be included because the bonuses are discretionary. Plew testified that he received a $2,000.00 bonus in 2016, a $2,000.00 bonus the year before, and a $2,500.00 bonus the year before that. (Tr., pp. 27-28) Hitzel testified bonuses are paid at the owners' discretion and she is uncertain if they are paid every year and in the same amount. (Tr., pp. 77, 81-82)

1. Undefined Terms

The terms "recurring" and "irregular bonuses" contained in the definition of "gross earnings" are not defined in Iowa Code chapter 85 or in the administrative rules adopted by the Workers' Compensation Commissioner, 876 IAC chapters 1 through 12. Therefore, it is necessary to resort to statutory interpretation principles.

The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire Marine Ins. Co, 677 N.W.2d 755, 759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and "not what the legislature might have said." Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous, then the court looks to the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d

216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute's meaning. Ramirez-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute's provisions in context. Id.

When the legislature has not defined a term in a statute, the court considers the term in the context in which it appears and applies the ordinary and common meaning to the term. Id. (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010). Courts determine the ordinary meaning of a term by examining precedent, similar statutes, the dictionary, and common usage. Sanford, 863 N.W.2d at 289.

As discussed above, the statute does not define the terms "recurring" and "irregular bonuses." Therefore, the common and ordinary meaning of the words applies in the context of the statute and the statute's history. Myria Holdings, Inc., 892 N.W.2d at 349. Webster's New World Dictionary (3rd College Ed. 1988) defines the term "recur" as "to happen or occur again, esp. after some lapse of time; appear at intervals," the term "irregular" as "uneven in occurrence or succession; variable or erratic," and the term "bonus" as an "extra payment over and above salary given to an employee as an incentive or award."

2. Bonus Determination

The Iowa Supreme Court and Iowa Court of Appeals have issued two published cases involving the treatment of bonus income when determining an employee's rate, Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (Iowa 2012) and Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa Ct. App. 1991).

In Noel, Rolscreen paid a Christmas bonus to each employee based on the number of years of continuous service, and the amount of gross wages earned in in the applicable fiscal year. 475 N.W.2d at 667. The bonus was not contingent upon the business showing a profit or reaching a profit margin, employees could not borrow against the bonus until the precedent conditions were met, the bonus was paid from Rolscreen's general operating account and not an account earmarked for the employee, and the program was voluntary and could be discontinued or altered by Rolscreen or replaced with another fringe benefit at Rolscreen's discretion. Id. The court of appeals found "a bonus should not be used to determine an employee's weekly workers' compensation benefit unless the employee's right to the benefit has vested at the time of his or her injury," following decisions of the Colorado and Florida courts. Id. The court held "[w]e affirm on this issue" and further found the Christmas bonus was not earnings because it was not paid or received within the thirteen weeks prior to the work injury, it was not a regular bonus given it was dependent on several conditions precedent, it varied in amount, and it was not fixed in terms of entitlement or amount until late in the fiscal year. Id. at 667-68.

In Burton, the Commissioner determined Burton's annual bonus should be used in calculating Burton's rate. 813 N.W.2d at 264. The Iowa Supreme Court affirmed, finding the evidence presented at hearing established the bonus was regular, given Burton received a bonus every year she worked for Hilltop, the bonus was paid despite Burton's performance concerns, the bonus was paid to Burton for being a part of the operation, and Burton's supervisor testified Burton was entitled to the bonus. Id. at 266.

Plew testified he has received a bonus each year. (Tr., pp. 27-28) While his post-hearing brief lists two bonus amounts, the wage records support he received one bonus of $2,200.00. (JE 12, p. 93) Hitzel testified payment of the bonus is discretionary. (Tr., pp. 77, 81-82) According to Plew's testimony, he received different bonus amounts each year. Plew did not present any documentation obtained in discovery, whether a bonus is paid each year, who determines whether a bonus is paid, when the bonus is paid, or the amount of the bonus. The evidence establishes the bonus is not a recurring payment, but is a bonus paid at the owners' discretion. Under the statute the bonus should be excluded from gross earnings for purposes of determining Plew's rate for workers' compensation benefits.

B. Rate Calculation

Plew avers the weeks of November 11, 2015, November 25, 2015, and December 29, 2015 are nonrepresentative, and should not be included in the rate calculation. Service Master and Accident Fund contend these weeks should be included, noting weeks where Plew worked overtime were also included. The wage records submitted support that Plew's hours varied. (JE 12; JE 13) Plew regularly worked more than forty hours. The weeks of November 11, 2015, November 25, 2015, and December 29, 2015 are nonrepresentative and should be excluded.

Service Master and Accident Fund did not include Plew's on-call pay of $50.00 in their rate calculation. Plew testified he is on-call every four weeks. I conclude the on-call pay should be included in the rate calculation. Plew did not explain the emergency or commission income at hearing or in his post-hearing brief. The emergency and commission income should not be included in Plew's gross earnings. The record supports Plew's gross earnings for the thirteen weeks total $9,085.12, divided by 13 equals $698.86. Under the ratebook in effect at the time of the injury, Plew's weekly rate is $442.14.[1]

V. Medical Expenses

Plew seeks to recover medical mileage totaling $234.08, unpaid medical bills totaling $1,556.74, and $3,185.22 in out-of-pocket medical bills he has paid. (JE 22) An employer is required to furnish reasonable surgical, medical, dental, osteopathic,

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[1] http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2015ratebook.pdf.

chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206.

As analyzed above, Plew sustained a work injury arising out of and in the course of his employment with Service Master. Service Master and Accident Fund are responsible for all causally related medical bills. Exhibit 22 documents Plew paid $42.91 for medication, $1,110.00 for physical therapy, and $2,032.31 to Iowa Methodist West Hospital for his surgery, for his work injury, totaling $3,185.22. Plew's personal insurer paid $8,011.73 toward the surgery, and $1,304.00 remains outstanding to Iowa Methodist West Hospital. Plew is entitled to recover the $3,185.22 he has paid for medical treatment and medication related to his work injury. Service Master and Accident Fund are responsible for the unpaid medical bills totaling $1,304.00 from the surgery. Plew did not submit any written documentation supporting the charges from May 3, 2016, May 9, 2016, and May 18, 2016, totaling $506.22. Plew has not established the charges are related to his work injury.

Plew also seeks to recover medical mileage totaling $234.08. (JE 22, p. 219) Rule 876 Iowa Administrative Code 8.1(2) provides for recovery of medical mileage. The evidence presented at hearing does not support Plew attended two appointments related to his work injury at UP Southglen on February 22, 2016, an appointment UP Southglen on April 25, 2016, DMOS on April 27, 2016 or May 3, 2016, or Methodist West on May 3, 2016 and May 9, 2016. Plew has established he is entitled to medical mileage totaling $157.72.

VI. Penalty

Iowa Code section 86.13 governs penalty benefits. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Service Master and Accident Fund commenced a prompt investigation of Plew's claim and promptly notified him of the reason for the denial. I conclude Plew's claim was fairly debatable. I decline to award Plew penalty benefits.

VII. Independent Medical Examination

Plew seeks to recover the $2,560.00 cost of Dr. Bansal's independent medical examination and report. After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. Dr. Bansal's examination occurred after Dr. Hatfield provided his impairment rating to Service Master and Accident Fund, in compliance with the statute.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Bansal's bill is not itemized. (JE 23, p. 233) Under Young, Plew is not entitled to recover the cost of Dr. Bansal's independent medical examination and report. Id.

VIII. Costs

Plew seeks to recover the $100.00 filing fee for the petition, $77.94 in service costs, and $515.00 for the depositions of Roovart, Pollard, Fusaro, and Hitzel. (JE 23) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the

commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 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, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs Plew seeks to recover. Using my discretion, I find the $100.00 filing fee, the $77.94 service costs, and $515.00 cost for the depositions should be assessed to Service Master and Accident Fund. As analyzed above, Dr. Bansal's bill for the independent medical examination and report is not itemized. Plew is not entitled to recover the cost of the examination and report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Service Master and Accident Fund shall pay Plew seventy-five (75) weeks of permanent partial disability benefits, at the rate of four hundred forty-two and 14/100 dollars ($442.14) per week, commencing on June 27, 2016.

Service Master and Accident Fund shall pay Plew weeks of healing period benefits, from February 16, 2016 through May 31, 2016, and June 1, 2016 through June 26, 2016, at the rate of four hundred forty-two and 14/100 dollars ($442.14) per week.

Service Master and Accident Fund shall take credit for all benefits previously paid.

Service Master and Accident Fund shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

Service Master and Accident Fund are responsible for all causally related medical bills, including but not limited to three thousand one hundred eighty-five and 22/100 dollars ($3,185.22) in out-of-pocket medical expenses, one thousand three hundred four and 00/100 dollars ($1,304.00) in unpaid medical expenses, and one hundred fifty-seven and 72/100 dollars ($157.72) in medical mileage.

Service Master and Accident Fund are assessed one hundred and 00/100 dollars ($100.00) for the filing fee, seventy-seven and 94/100 dollars ($77.94) for service costs, and five hundred fifteen and 00/100 dollars ($515.00) for depositions.

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

Signed and filed this 30th day of October, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.