

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN ARKFELD,

Claimant,

vs.

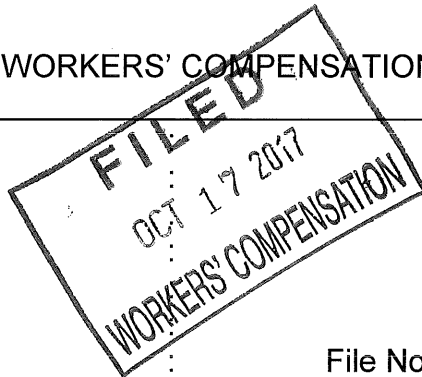
ARKFELD WATER SERVICES,

Employer,

and

IOWA MUTUAL INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File Nos. 5054390, 5054391

ARBITRATION

DECISION

Head Note No.: 1402.40

Claimant Brian Arkfeld filed two petitions in arbitration on August 7, 2015, alleging he sustained injuries to his back while working for the defendant, Arkfeld Water Services, on September 12, 2013, and October 8, 2013. Arkfeld Water Services and its insurer, the defendant, Iowa Mutual Insurance Company ("Iowa Mutual"), filed answers to the petitions on October 12, 2015, admitting Arkfeld sustained injuries while working for Arkfeld Water Services.

An arbitration hearing was held on May 10, 2017, at the Pottawattamie County Courthouse in Council Bluffs, Iowa. Attorney Jacob Peters represented Arkfeld. Arkfeld appeared and testified. Mary Arkfeld and Jennifer Woodman appeared on behalf of Arkfeld, but did not testify. Attorney Jeffrey Lanz represented Arkfeld Water Services and Iowa Mutual. Jayme Arkfeld appeared and testified on behalf of Arkfeld Water Services and Iowa Mutual. Joint Exhibits ("JE") 1 through 13, Claimant's Exhibits 1 and 2, and Defendants' Exhibits A through F, and J were admitted into the record.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Arkfeld Water Services and Iowa Mutual raised the affirmative defense of apportionment and waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injuries.
2. Arkfeld sustained injuries on September 12, 2013, and October 8, 2013, which arose out of and in the course of his employment with Arkfeld Water Services.
3. Although entitlement to temporary benefits cannot be stipulated, Arkfeld has been off work since May 31, 2016.
4. If Arkfeld has sustained a permanent disability, the disability is an industrial disability.
5. At the time of the alleged injuries Arkfeld's gross earnings were \$620.00 per week, he was married and entitled to three exemptions, and the parties believe his weekly rate is \$420.59.
6. Prior to the hearing Arkfeld was paid seventy-five weeks of compensation at the rate of \$356.83.
7. Costs have been paid.

ISSUES

1. Did the alleged injuries cause a temporary disability during a period of recovery?
2. Are the alleged injuries a cause of permanent disability?
3. Is Arkfeld entitled to a running award of temporary disability benefits from May 31, 2016?
4. If Arkfeld has sustained a permanent disability, what is the extent of disability?
5. If Arkfeld has sustained a permanent disability, what is the commencement date for permanent partial disability benefits?
6. Does apportionment under Iowa Code section 85.34(7)(b)(1) apply?
7. Is Arkfeld entitled to recover the cost of an independent medical evaluation?
8. Is Arkfeld entitled to alternate medical care?
9. Should costs be assessed against either party?

FINDINGS OF FACT

Arkfeld graduated from high school in 1974. (Transcript, page 11; Exhibit F, p. 37) Arkfeld lives with his wife in Earling, Iowa. (Exs. A, p. 4; F, p. 37) At the time of the hearing Arkfeld was sixty. (Tr., p. 11)

After graduating from high school Arkfeld went to work for his father, who owned Clem Arkfeld & Sons ("Clem Arkfeld"), performing well digging and trenching plumbing services. (Tr., p. 12; Ex. A, p. 7) Arkfeld worked for his father until 2000, when his brother, Jayme Arkfeld, purchased the business and changed the business name to Arkfeld Water Services. (Tr., p. 12; Ex. A, pp. 7-9)

In September 2007, Arkfeld was working in a trench when he pulled on a pipe and injured his back. (Tr., pp. 14-15; Ex. A, p. 14) The evening of the injury Arkfeld began experiencing a tingling sensation, and he sought medical care. (Tr., pp. 15-16) Arkfeld testified he never had any back problems before his 2007 injury. (Tr., p. 16; Ex. A, p. 14)

In October 2007, Arkfeld attended an appointment with Bradley Bowdino, M.D., a neurosurgeon. (JE 2, p. 11) Dr. Bowdino listed an impression of "[l]eft leg pain predominantly L3 distribution type pattern versus L4," and "L4-L5 spondylolisthesis with severe stenosis." (JE 2, p. 12) Dr. Bowdino recommended and performed a transforaminal lumbar interbody fusion at L4-5 and L4-5 laminectomy in January 2008. (JE 2, pp. 15-17; JE 3, p. 70; JE 4, p. 162) Dr. Bowdino diagnosed Arkfeld with L4-5 lumbar spinal stenosis and L4-5 lumbar degenerative disk disease with mechanical instability. (JE 3, p. 70; JE 4, p. 162)

Following the surgery Arkfeld was off work for a period of time. (Tr., p. 37; Ex. A, pp. 15-16) Dr. Bowdino released Arkfeld to return to work with a seventy-five pound lifting restriction on April 30, 2008. (JE 2, p. 18)

After returning to work Arkfeld complained of low back and bilateral lower extremity pain. (JE 2, p. 20) Arkfeld received prescriptions for 800 mg of ibuprofen and Ultram, and he was released to return to work. (JE 2, p. 22) Dr. Bowdino placed Arkfeld at maximum medical improvement on January 28, 2009, and issued an impairment rating of thirteen percent under page 404 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (JE 2, p. 24) Dr. Bowdino informed Arkfeld he would eventually have problems above and below the fusion if he continued to work and that he may need surgery at those levels. (Tr. p. 36; Ex. A, p. 17)

Arkfeld did not retain an attorney for assistance with his 2007 work injury, and he received seventy-five weeks of permanent partial disability benefits. (Tr., p. 17) Arkfeld returned to his normal duties and he did not follow his permanent restrictions at work. (Tr., pp. 18, 37) Arkfeld's counsel made a professional statement that the medical case from the 2007 injury has not been closed. (Tr., pp. 61-62)

From 2007 forward, Arkfeld continued to receive treatment for pain, including steroids, injections, anti-inflammatory medication, pool therapy, and physical therapy. (Tr., pp. 19-20; JE 2, pp. 25-31; JE 3, pp. 73-78; JE 5, pp. 169, 178-80) During an appointment on March 3, 2010, Dr. Bowdino noted electromyography from December 2008 showed very mild polyneuropathy, and for the past couple of months Arkfeld had “escalating pain in the lateral aspect of his feet” and he had been off work for three months without any heavy lifting. (JE 2, p. 26) In May 2010, Dr. Bowdino recommended physical therapy and pharmacological treatment. (JE 2, p. 28)

Arkfeld continued to complain of back pain and lower extremity pain with neuropathy, and he received pain management treatment. (JE 2, p. 29) During an appointment with Dr. Bowdino on November 18, 2011, Arkfeld reported his condition had worsened and he was experiencing “pain in the lateral thighs in the distribution of the lateral femorocutaneous nerve” and “pain around the ankles and circumferentially that goes down into his feet bilaterally.” (JE 2, p. 29) Dr. Bowdino ordered electromyography, which was normal. (JE 2, p. 30)

On March 26, 2012, Arkfeld attended an appointment with Charles Taylon, M.D., a neurosurgeon with Creighton University Medical Center. (JE 6, p. 185) Dr. Taylon noted that following the fusion performed by Dr. Bowdino Arkfeld did well postoperatively, but he “developed the same symptomology he had prior to his surgery with pain radiating down his legs into his feet. EMGs have been normal although repeat MRI of his back done in January 2012 does demonstrate canal stenosis at the levels of L2-3 and L3-4, which seem to be causing him his symptoms at this point in time.” (JE 6, p. 185) Dr. Taylon examined Arkfeld, discussed conservative treatment with the potential need for surgery, and noted “[w]e have stated to Mr. Arkfeld that he is unable to continue probably in the line of work that he is doing at this point in time.” (JE 6, p. 185)

Arkfeld attended an appointment with James Devney, D.O., a physiatrist, on October 2, 2012, complaining of low back pain, bilateral lower extremity pain, and bilateral lower extremity numbness. (JE 7, p. 187) Dr. Devney began treating Arkfeld for pain management. (Ex. A, p. 29) Dr. Devney reviewed Arkfeld’s imaging, examined him, and listed an impression of status post L4-5 transforaminal lumbar interbody fusion, lumbar disc degeneration, lumbar facet arthropathy, lumbar spondylolisthesis, lumbar spinal stenosis, and lumbar radiculitis versus meralgia paresthetica. (JE 7, p. 190) Dr. Devney recommended and performed a lumbar transforaminal epidural, and recommended a functional capacity evaluation. (JE 7, p. 190)

On October 22, 2012, Arkfeld underwent a functional capacity evaluation. (JE 8, p. 196) The physical therapist reported the test was valid and found Arkfeld demonstrated the ability to lift and carry fifty pounds on an occasional basis and twenty pounds on a frequent basis. (JE 8, p. 196) The physical therapist recommended a restriction of no prolonged or repetitive forward bending, with forward bending restricted to an occasional basis. (JE 8, p. 196)

On September 12, 2013, Arkfeld was installing new pipes under a home's crawl space. (Tr., p. 21) Arkfeld knocked out a few blocks in the wall with a hammer drill, and as he walked down the stairs to the basement he missed the last two steps and landed on his "feet but sideways and tweaked [his] back." (Tr., p. 21) Arkfeld testified that after the injury his lower back and leg pain increased, and the pain was worse in his right leg than in his left leg. (Tr., pp. 21-22) Arkfeld did not receive medical care the day of his injury.

On September 16, 2013, Arkfeld went to the emergency room at Myrtue Medical Center, complaining of low back pain radiating down both legs. (Tr., p. 22; JE pp. 79) Arkfeld received tramadol and Medrol prescriptions. (JE 3, p. 82) During his deposition Arkfeld testified following his September 12, 2013 injury his leg symptoms were the same, but he felt like he had a "ball hanging off [his] tailbone." (Ex. A, p. 39)

Arkfeld returned to Myrtue Medical Center on September 23, 2013, for a follow up appointment with David Erlbacher, M.D., a family practice physician. (JE 3, p. 86) Dr. Erlbacher documented Arkfeld reported he was only having slight back pain and he had stopped taking tramadol and hydrocodone. (JE 3, p. 86) Dr. Erlbacher recommended Arkfeld resume taking tramadol and hydrocodone and that he see a neurosurgeon. (JE 3, p. 88)

On October 4, 2013, Arkfeld returned to Dr. Bowdino, complaining of low back and bilateral lower extremity pain, greater on the right than the left. (JE 2, p. 33) Dr. Bowdino documented Arkfeld reported he was doing well until September 12, 2013, when he experienced an acute onset of back pain secondary to work-related duties. (JE 2, p. 33) Dr. Bowdino ordered and reviewed computerized tomography scans, noting "[s]olid arthrodesis is noted at L4-5 with no complicating features regarding his overall hardware. He does have adjacent level disease at the L3-4 level resulting in significant spinal stenosis with broad-based disk protrusion associated at this level." (JE 2, p. 33) Dr. Bowdino assessed Arkfeld with lumbar spinal stenosis at L3-4 and noted "[a]t this point we felt symptoms are symptomatic from the L3-4 stenosis identified with a subsequent broad-based disk protrusion at the L3-4 level. At this time we would recommend observation regarding his overall complaints. We do feel this is a new injury." (JE 2, p. 34)

On October 8, 2013, Arkfeld Water Services was digging a well for a customer. (Tr., p. 24) Arkfeld was on the opposite side of the bucket standing on the platform of the machine pulling a rope, and as he pulled, the rope broke and he reported, "I went going backwards, hit my back on – there's a little tool tray there. I hit that with my back and my arm, and I twisted around, and I pushed myself off the machine from the radiator grill and I landed on the ground," approximately three to four feet below the platform. (Tr., pp. 25-26) Arkfeld's brother, Jayme Arkfeld, was running the machine, and his other brother, Richard Arkfeld, also witnessed his fall. (Tr., p. 26)

Arkfeld testified he experienced more lower back and leg pain after he fell, but he finished his shift that day. (Tr., p. 26) Arkfeld sought medical care at Myrtue Medical

Center the next day, complaining of right elbow pain and low back pain. (Tr., pp. 26-27; JE 3, pp. 93-94)

Arkfeld received follow-up care at Myrtue Medical Center with Scott Markham, D.O., a family practice physician, and Jill Ferry, PA-C. (JE 3) During his appointment on November 5, 2013, Arkfeld reported he thought he was getting better, but his lumbar back pain had worsened over the past week and the pain was radiating down into his thighs. (JE 3, p. 103) Ferry placed Arkfeld on light duty, ordered physical therapy, and prescribed meloxicam and Cymbalta. (JE 3, pp. 103-09) On January 13, 2014, Dr. Markham and Ferry imposed a fifty pound lifting restriction and recommended no further treatment. (JE 3, p. 111)

On July 15, 2014, Arkfeld returned to Dr. Bowdino complaining of low back and bilateral lower extremity pain. (JE 2, p. 39) Dr. Bowdino reviewed Arkfeld's magnetic resonance imaging scans from 2012 and November 2013, and noted "[m]oderate to severe spinal stenosis is identified at the L3-4 level. There has not been a lot of progression since 2012. Postoperative changes consistent with his previous fusion at L4-5 are noted." (JE 2, p. 39) Dr. Bowdino assessed Arkfeld with L3-4 spinal stenosis, and recommended conservative therapy with epidural steroid injections and physical therapy. (JE 2, pp. 39-40)

After leaving Dr. Bowdino's office Arkfeld experienced a seizure at Menards. (Tr., p. 29; JE 3, p. 115; JE 9; Ex. A, p. 45) Until his seizure Arkfeld continued to perform his normal duties for Arkfeld Water Services. (Tr., pp. 58-59; Ex. A, p. 46) Medical staff restricted Arkfeld from driving, climbing ladders, and going down into wells for six months. (JE 3, pp. 115, 117; Tr., p. 60) He treated with a neurologist. (Tr., p. 30) Arkfeld's employment with Arkfeld Water Services ended on July 14, 2015, after his seizure. (Tr., p. 30; Exs. A, p. 8; F, p. 38)

Dr. Bowdino issued a note on September 23, 2014, after speaking with the insurance adjuster, noting:

The different adjusters have been going back and forth as to where the responsibility lies with regard to Brian's medication use regarding his initial injuries. This dates back to my taking care of him back to 2007. At this point, it seems to me after review of his records, that this has been fairly ongoing, continuous problem related to the 2007 injury, and I would believe that his medication use and/or his follow-up therapies have largely stemmed from that. Even though he has had new issues in 2013 that flared up again, I believe that these really do not represent a new injury but an ongoing injury.

(JE 2, p. 44)

Arkfeld reported he did not receive any relief from the injections and the pain in his low back continued to get worse. (Tr., p. 32) Arkfeld reported from 2014 to 2015, the pain became worse and started going down the back of his legs. (Tr., p. 32)

On January 30, 2015, Arkfeld returned to Dr. Bowdino and reported since his last visit he had fallen backwards in a local hardware store, he had a seizure, and he had been off work for six months. (JE 2, p. 45; Tr., p. 60) Dr. Bowdino recommended physical therapy. (JE 2, p. 45)

In May 2016, William Boulden, M.D., an orthopedic surgeon, performed an independent medical examination of Arkfeld for Arkfeld Water Services and Iowa Mutual. (JE 11) Dr. Boulden reviewed Arkfeld's medical records and examined him. (JE 11, p. 210) Dr. Boulden opined,

I do not believe that the September 12, 2013, or the October 8, 2013, work injuries had anything to do with the patient's pathological processes. He may have had some temporary aggravations, but it has been noted, since he has not been doing his heavy physical work, which he truly believes was an aggravating factor, as do most of the physicians, that his pain has been much more tolerable. There have been no pathological changes that one can attribute to these injuries. There has been nothing structurally changed or clinically identified.

(JE 11, p. 216) Dr. Boulden concluded Arkfeld did not need any further care for his September 13, 2013 and October 8, 2013 work injuries, he did not require any additional permanent restrictions based on the 2013 work injury, and his permanent impairment rating following his 2007 work injury had not changed. (JE 11, pp. 216-17) Dr. Boulden opined Arkfeld's pathological changes at L2-3 and L3-4 are related to his previous problems from 2007 and the fusion he had at L4-5. (JE 11, p. 217)

Arkfeld applied for Social Security Disability Insurance benefits, alleging his back condition, seizure disorder, depression, leg and feet numbness, hearing loss, and confusion/loss of memory preclude him from working. (Tr., p. 34; JE 12, p. 225) The Social Security Administration approved Arkfeld's application on June 4, 2016, and found he became disabled on July 15, 2014, the date of his seizure. (JE 12, p. 236; Tr., p. 68)

On June 8, 2016, Arkfeld attended an appointment with Guy Music, M.D., Dr. Bowdino's partner. (JE 2, pp. 49-53) Dr. Music examined Arkfeld and his imaging from May 11, 2015. (JE 2, pp. 52-53) Dr. Music noted Arkfeld had a complicated history and opined he could not accurately discern whether his present condition was caused by a new injury in September 2013, or whether it was ongoing from his 2007 injury. (JE 2, p. 53) Dr. Music further noted, "[n]onetheless, at this point in time Brian has symptomatic stenosis that I believe is related to adjacent segment degeneration immediately cephalad to his prior fusion," and reported he did not have any further nonsurgical options to offer Arkfeld and recommended performing "an L3-4 laminectomy

and TLIF to extend his fusion up.” (JE 2, p. 54) Dr. Music imposed a twenty pound lifting restriction. (JE 2, p. 54)

Ferry reviewed records from Drs. Bowdino, Boulden, and Music, and on July 1, 2016, responded by letter to a request from the defendants’ counsel regarding Arkfeld’s condition as follows:

[i]n reading Dr. Boulden’s opinions, I do agree that the injury in 2013 caused at most temporary aggravation of pain of Mr. Arkfeld’s chronic ongoing back condition. Given mechanism of injury, he certainly did have some discomfort as well as pain, however I do not feel the injury sustained at that particular time in 2013 caused any further pathologic or structural changes to his back based on MRI findings. I do agree that his condition is indeed painful for him and he is needing further surgery under the care of Dr. Music, but again it is very difficult when one reviews the mechanism of injury from September, 2013 and October, 2013 that those new injuries were causing the spinal stenosis based on the fact that the patient had spinal stenosis on prior MRIs including the ones noted in 2007.

(JE 3, p. 157)

On July 13, 2016, the defendants’ counsel sent Dr. Boulden Dr. Music’s June 8, 2016 note, and the July 1, 2016 letter from Ferry. (JE 11, p. 218) Dr. Boulden signed a letter drafted by counsel for the defendants without providing any comments, agreeing his opinions had not changed. (JE 11, p. 219) Dr. Boulden agreed he did not believe Arkfeld’s need for surgery or ongoing restrictions were causally related to the September and October 2013 work injuries. (JE 11, p. 219)

Pursuant to a request from Arkfeld’s counsel, Dr. Music issued a letter on July 29, 2016, opining:

1. Based on the definitions set forth in your request, I do think it is within a reasonable degree of medical certainty, that Brian’s falls at work in September and October 2013 led to a persistent aggravation of his underlying degenerative stenosis. The stenosis was a pre-existing problem, however at that point in time records indicate that it was minimally symptomatic until the falls occurred. Following the falls, this has been a persistent problem which led to his evaluation by both myself and Dr. Bowdino.

2. The current diagnoses for Brian Arkfeld are lumbar spinal stenosis with neurogenic claudication and lumbar spondylosis.

The recommended course of treatment for his stenosis is a laminectomy at L3-4, however he shows some loosening and progressive enlargement of the facet joints immediately superior to his prior fusion so in addition to

a laminectomy I am recommending that his fusion be extended to involve the L3-4 level as well.

(JE 2, pp. 62-63) Dr. Music charged \$500.00 for the opinion letter. (JE 2, p. 61) In response to a request from the defendants to conduct a records review, Dr. Music responded he would charge \$6,000.00 to review Arkfeld's records for four hours. (JE 2, p. 65)

On August 25, 2016, Ferry issued an additional letter, opining,

It is noted that the patient certainly has symptomatic stenosis which is believed to be related to adjacent segment degeneration immediately cephalad to his prior fusion as well as failing conservative treatment. He was referred to Dr. Music and it is the opinion of Dr. Music that patient proceed with surgery for his pain. I do agree that this patient is suffering from pain based on his physical findings today and need for further surgery under the care of Dr. Music is warranted. It is my opinion, however, that it is difficult to determine if the mechanism of injury from September, 2013 and October, 2013 truly caused his worsening spinal stenosis. I do agree that these injuries were aggravations of his pain but of note is that he has had chronic ongoing back issues from 2007 and findings of spinal stenosis were noted at that time.

(JE 3, pp. 158-59)

In December 2016, Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination for Arkfeld. (JE 13) Dr. Bansal reviewed Arkfeld's medical records and examined him. (JE 13) Dr. Bansal diagnosed Arkfeld with "[a]ggravation of L3-L4 spondylosis and facet arthropathy, with a disc protrusion." (JE 13, p. 265) Dr. Bansal found Arkfeld sustained two work injuries on September 12, 2013, and October 8, 2013, and concluded "[t]he above mechanism of falling on September 12, 2013 and October 8, 2013, coupled with his immediate clinical presentation, is consistent with the aggravation of his L3-L4 disc pathology." (JE 13, p. 266) Dr. Bansal opined the work injuries aggravated Arkfeld's existing stenosis, noting,

Mr. Arkfeld reports that he has had an increase in his back pain and radiculopathy since the 2013 injuries. He has also had a marked change in his treatment plan, with a recommendation made for an L3-L4 fusion since the 2013 injuries. As an exacerbation versus an aggravation implies a return to baseline after a reasonable treatment period, Mr. Arkfeld clearly did not have an exacerbation. It has been more than three years since the injuries and he is clearly not at baseline, and is in need of a fusion operation.

Most importantly in this particular case, the worsening is corroborated by a marked change in his pre and post injury MRIs, indicating a new disc protrusion at L3-L4.

MRI Pre September 12, 2013 and October 8, 2013 injuries:

Date of service January 20, 2012. MRI of the lumbar spine.

FINDINGS: At L4-L5, the disc space demonstrates changes of prior disc space and posterior fusion. The patterns are noted to be stable. There is decompressive laminectomy change. There are osteophytic changes along the endplates, stable. At L3-L4, the disc space demonstrates disc space dessication. The facet joints are hypertrophic, with hypertrophy of the ligamentum flavum. There is moderate to severe central canal stenosis. The pattern is noted to be similar.

VERSUS:

MRI Post September 12, 2013 and October 8, 2013 Injuries:

Date of service November 13, 2013. MRI of the lumbar spine.

FINDINGS: At L3-L4, there is disc degenerative change with broad-based posterior protrusion of disc material centrally, in conjunction with moderate facet arthropathy. These changes give rise to mild narrowing of the spinal canal, as well as mild narrowing of the bilateral lateral recesses and neural foramina. At the L4 and L5 segments, there are no findings of hardware complications. The L5 screw on the left side is seated just a little bit lateral to the vertebral body, unchanged from prior imaging. No pathologic focus of enhancement is evident.

Using the above qualifiers, it is clear that Mr. Arkfeld incurred a permanent aggravation from his September 12, 2013 and October 8, 2013 injuries. The records and his subjective reporting indicate that his low back pain with radiculopathy became markedly more intense after these injuries, consistent with his change in MRI showing a new L3-L4 disc protrusion.

(JE 13, pp. 267-68) Dr. Bansal opined Arkfeld's current back pathology and need for surgery are related to his September 12, 2013 and October 8, 2013 work injuries, and placed Arkfeld at maximum medical improvement on June 8, 2016, the date of his last appointment with Dr. Music. (JE 13, p. 268)

Using Table 15-3 of the AMA Guides Dr. Bansal opined Arkfeld meets the criteria for a DRE Category III impairment noting "[h]e has radicular complaints corresponding with his disc pathology at L3-L4. He is assigned a provision rating of 13% of the whole person. However, this would change if he proceeds with a fusion at L3-L4." (JE 13, pp. 268, 269) Dr. Bansal agreed with Dr. Music's surgical recommendations, and noted if

Arkfeld opts not to have the procedure, he would benefit from additional medication, epidural injections or nerve ablation, physical therapy, and other treatment recommended by a pain specialist. (JE 13, p. 269)

Dr. Music prepared a statement of disability/work status form on March 22, 2017, finding Arkfeld should be off work pending scheduling for surgery, and imposed a lifting restriction of fifteen pounds. (JE 2, p. 66)

Counsel for Arkfeld Water Services and Iowa Mutual sent Dr. Boulden the September 23, 2014 report from Dr. Bowdino, the July 29, 2016 letter from Dr. Music, Dr. Bansal's independent medical examination, and pages 29 through 35 of Arkfeld's deposition transcript. (JE 11, p. 221) Dr. Boulden signed the letter agreeing to the following, without providing any written comments:

5. Dr. Music noted on July 29, 2016, that Mr. Arkfeld "was minimally symptomatic until the falls occurred." It is your opinion that statement is incorrect based upon the medical treatment Mr. Arkfeld received and Mr. Arkfeld's testimony during his deposition that he continued to have daily symptoms of a 7-8/10. Therefore, Dr. Music's opinions dated July 29, 2016, appear to be based upon an incorrect history.

6. Since there was no significant change in symptoms following the 2013 injuries and no objective/pathological changes caused by the 2013 injuries, your opinions as stated in paragraphs 2 and 3 above remain unchanged.

7. Dr. Bowdino gave Mr. Arkfeld a 13% BAW impairment rating on July 28, 2009. Dr. Bansal gave Mr. Arkfeld a 13% BAW impairment rating on December 9, 2016. This substantiates your opinions that the 2013 injuries caused at most temporary aggravations and resulted in no additional permanency or need for permanent restrictions.

(JE 11, p. 221)

Arkfeld testified he has not had surgery because Arkfeld Water Services and Iowa Mutual have refused to pay for the surgery. (Tr., p. 33)

Arkfeld's wife operates a licensed daycare out of their home. (Tr., p. 64; Ex. A, pp. 8-9, 60-61) Arkfeld assists his wife with the daycare and she is able to care for sixteen as opposed to eight children because of Arkfeld assists her. (Tr., p. 64; Ex. A, p. 9) Arkfeld works full-time in the daycare, forty hours per week, and he is paid \$3,000.00 per year. (Tr., pp. 66-67; Ex. F, p. 37) Arkfeld reported he supervises the children on the playground. (Tr., p. 80) Arkfeld has not applied for any positions since his seizure. (Tr., p. 76)

Arkfeld lives in a home with his wife and they own two vacant lots on each side of the homestead. (Tr., p. 78) Arkfeld is able to mow the property with a riding

lawnmower, operate a weed eater, and remove snow. (Tr., pp. 78-79; Ex. A, p. 56)
Arkfeld assists with laundry, cooking, and washing the dishes. (Tr., p. 79)

CONCLUSIONS OF LAW

I. Aggravation of Arkfeld's Lumbar Spinal Condition

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). It is undisputed Arkfeld sustained injuries at work on September 12, 2013, and October 8, 2013. The parties dispute whether Arkfeld's September and October 2013 injuries aggravated his preexisting lumbar spine condition.

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).

It is well-established in workers’ compensation that “if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

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

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967). Arkfeld alleges that the September and October 2013 work injuries aggravated his preexisting lumbar spine condition causing the need for additional surgery. Arkfeld Water Services and Iowa Mutual reject Arkfeld’s assertion and contend Arkfeld’s need for surgery is related to the work injury he sustained in 2007.

Ferry, and Drs. Music, Bowdino, Boulden, and Bansal have provided opinions concerning Arkfeld’s condition. Dr. Music, a treating neurosurgeon, and Dr. Bansal, an occupational medicine physician retained to perform an independent medical examination only, have opined Arkfeld’s 2013 work injuries aggravated his preexisting stenosis. Dr. Bowdino, a treating neurosurgeon, and Dr. Boulden, an orthopedic surgeon retained to perform an independent medical examination only, disagreed, and have opined Arkfeld’s condition and need for surgery are related to his 2007 work injury. Ferry, a treating physician’s assistant, opined it was difficult to determine the mechanism of injury, but she agreed with Dr. Music that the 2013 injuries aggravated Arkfeld’s ongoing back issues. I find the opinion of Dr. Bowdino, a treating neurosurgeon, to be the most persuasive.

Dr. Bowdino began treating Arkfeld in October 2007, following his September 2007 work injury. Dr. Bowdino performed surgery on Arkfeld, provided follow up care to Arkfeld, and treated him again following his September and October 2013 work injuries. Dr. Music provided treatment to Arkfeld following his 2013 work injuries. Drs. Boulden

and Bansal were only retained to provide independent medical examinations in this case.

Dr. Bansal opined the 2013 work injuries aggravated Arkfeld's existing stenosis, finding since his 2013 work injuries, Arkfeld's back pain and radiculopathy increased, and he had a "marked change in his treatment plan" with a recommendation for a fusion at L3-4, supported by changes in his imaging. (JE 13, pp. 267-68) Dr. Boulden disagreed, finding Arkfeld may have sustained temporary aggravations, but concluding there were no pathological changes that could be attributed to the 2013 work injuries and "[t]here has been nothing structurally changed or clinically identified." (JE 11, p. 216)

Dr. Bowdino has treated Arkfeld over the course of many years, starting in October 2007, following his September 2007 work injury, performed surgery on Arkfeld, provided ongoing care to Arkfeld up through the time of his 2013 injuries, and provided care to Arkfeld following the 2013 injuries. (JE 2, p. 11) Dr. Bowdino acknowledged Arkfeld "had new issues in 2013 that flared up again," but concluded, "I believe that these really do not represent a new injury but an ongoing injury." (JE 2, p. 44)

Dr. Music acknowledged Arkfeld's stenosis was preexisting, but found he was "minimally symptomatic" until the 2013 falls, and since the falls, "this has been a persistent problem." (JE 2, p. 62) The record does not support his assertion. Dr. Music received a payment of \$500.00 for the opinion letter he prepared. (JE 2, p. 61) When the defendants requested Dr. Music perform a records review, he informed the defendants he would require payment of \$6,000.00, to perform a six hour records review. (JE 2, p. 65) "When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding on the [trier of fact]." Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995) (citing Bodish v. Fisher, Inc., 257 Iowa 521, 521-22, 133 N.W.2d 867, 870 (1965)) The trier of fact determines the weight of the opinion, "that may be affected by the completeness of the premise given the expert and other surrounding circumstances." Id. I do not find Dr. Music's opinion persuasive because it is based on an incomplete history, and because Dr. Bowdino has treated Arkfeld over the course of many years, starting in 2007.

Arkfeld has not established the 2013 work injuries aggravated, accelerated, worsened, or lit up his preexisting spinal stenosis, causing his need for surgery. Arkfeld has not met his burden of proof. Therefore, the remaining issues, other than costs are moot.

II. Independent Medical Examination

Arkfeld seeks to recover the \$3,586.00 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. Boulden issued his opinion finding Arkfeld had not sustained a permanent impairment.

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 itemized. Under Young, and rule 876 IAC 4.33(6)(6) Arkfeld is entitled to recover the cost of Dr. Bansal’s exam and report. Id.

III. Costs

Arkfeld seeks to recover a single \$100.00 filing fee, the \$500.00 fee for Dr. Music’s report, and \$89.90 cost of his deposition. (Ex. 2) 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 Arkfeld seeks to recover. Using my discretion, I find the requested costs should be assessed to Arkfeld Water Services and Iowa Mutual.

ORDER

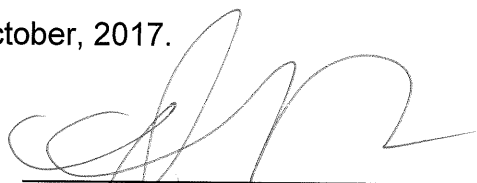
IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing with respect to File Numbers 5054390 and 5054391.

Defendants are assessed three thousand five hundred eighty-six and 00/100 dollars (\$3,586.00) for the cost of Dr. Bansal's examination and report, one hundred and 00/100 dollars (\$100.00) for the filing fee, five hundred and 00/100 dollars (\$500.00) for Dr. Music's report, and eighty-nine and 90/100 dollars (\$89.90) for the deposition transcript.

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 17th day of October, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.