BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NOLAN HENDERSON, Claimant, vs. KRAFT HEINZ COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 20700974.01 ARBITRATION DECISION Head Note Nos.: 1402.30, 1602, 1803, 2502, 2907

STATEMENT OF THE CASE

Nolan Henderson, claimant, filed a petition for arbitration against Kraft Heinz Company, as the employer and Indemnity Insurance Company of North America, as the insurance carrier. Claimant alleges an injury occurring on July 18, 2020.

This case came before the undersigned for an arbitration hearing on June 6, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom. All participants appeared remotely.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The written evidentiary record includes Joint Exhibits 1 through 3, Claimant's Exhibit 1, and Defendant's Exhibits A through J. All exhibits were received without objection.

Claimant testified on his own behalf. Defendants called Dale Tharp and Lisa Culberson to testify live. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs on or before July 15, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury arising out of and in the course of his employment on July 18, 2020.

2. Whether the claim is barred pursuant to Iowa Code section 85.16(3) as a result of a willful act of a third party directed against the claimant for reasons personal to claimant.

3. Whether claimant sustained a permanent disability as a result of the alleged July 18, 2020 injury.

4. Whether any permanent disability should be compensated functionally or with industrial disability benefits.

5. The extent of claimant's entitlement to permanent partial disability benefits, if any.

6. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Nolan Henderson, claimant, began working at the Kraft Heinz Davenport (hereinafter referred to as "Kraft") plant on March 6, 2018. (Defendants' Ex. A, p. 1) Mr. Henderson works as a raw material handler for Kraft. The primary duty performed by claimant is operating a forklift. (Tr., pp. 11, 22-23) However, claimant also has to shovel meat from time to time and use a high pressure hose each shift for cleaning purposes. (Tr., pp. 24-25)

On July 18, 2020, Mr. Henderson was working at the Kraft Heinz plant in his normal position and during his typical work hours. He took a break and went to the company-provided break room. Prior to his shift on that day, Mr. Henderson placed several water bottles in a refrigerator provided by the employer. He ultimately

consumed a portion of the contents of one of those water bottles during his break. (Tr., pp. 11-12)

Unfortunately, the water bottle contained cleaning chemicals from the employer's plant. There does not appear to be any dispute that claimant ingested cleaning chemicals and that the poisoning caused his subsequent reaction and hospitalization. Instead, the dispute in this case appears to revolve around how or why the chemicals were in claimant's water bottle.

Claimant contends he does not know how those cleaning chemicals got into his water bottle. He denies that anyone threatened him personally before the incident. (Tr., p. 16) He further denies having any disagreements or feuds with co-workers. Claimant asserts that he gets along with everybody at Kraft. (Tr., pp. 32-33)

The employer asserts that a co-worker, Melissa Smith, put the chemicals into Mr. Henderson's water bottle. Kraft asserts that claimant was romantically involved with Ms. Smith prior to the date of injury and that he had broken up with Ms. Smith a few days prior to the ingestion of chemicals. Accordingly, Kraft Heinz speculates that Ms. Smith put the cleaning chemical into claimant's water bottle, resulting in Mr. Henderson's poisoning. (Testimony of Lisa Culberson)

Several witnesses testified either live at the hearing or via deposition. As noted, claimant denies knowledge of how the chemicals got into his water bottle. He denies having a romantic relationship with Melissa Smith or terminating that relationship a few days prior to his poisoning. (Tr., p. 34) Claimant was very defensive at trial, however, when questioned about a relationship with Ms. Smith. He appeared agitated, raised his voice, and his denial of any relationship with Ms. Smith was not terribly credible. I would be skeptical of claimant's testimony if he was the only witness testifying in the case.

However, Ms. Smith also gave a deposition in this case. Melissa Smith denied hanging out with claimant outside of work. She also denied knowing who added chemicals to claimant's water bottle. I did not have the benefit of observing Ms. Smith's demeanor during her deposition, but she plainly denies having the relationship with Mr. Henderson, as asserted by the employer. (Defendants' Ex. I)

The employer introduced depositions of Anthony Steele and Amanda Cody. Mr. Steele is claimant's friend. He also works at Kraft. (Defendants' Ex. H, pp. 46-47) Mr. Steele acknowledge that he knows claimant sees Ms. Smith outside of work but denied having any idea if the two were romantically involved. (Defendants' Ex. H, p .47) Mr. Steele denied any knowledge of who poisoned claimant. (Defendants' Ex. H, p. 48)

Amanda Cody continues to work for Kraft. She is aware that someone keyed claimant's car in the past but denies knowledge of who undertook that vandalism. (Defendants' Ex. G, p. 42-43) Ms. Cody was on vacation on the date claimant was poisoned and denies knowledge of who put the chemicals in claimant's water bottle.

(Defendants' Ex. G, p. 43) Ms. Cody also confirmed claimant's general statement that he gets along with everyone at Kraft. (Defendants' Ex. G, p. 44)

Kraft also called two witnesses to testify live at hearing. Dale Tharp was the materials supervisor at Kraft on the date of claimant's poisoning and remains in that position. He testified that claimant has returned to his same job duties with Kraft and has not requested accommodations to perform his duties. However, Mr. Tharp offered no testimony to support the employer's theory that Melissa Smith poisoned claimant for reasons personal to claimant.

Kraft also called Lisa Culberson. Ms. Culberson is the operational risk manager for Kraft. She is in charge of safety, security and environmental concerns at Kraft's plant. Ms. Culberson was not present at the time of claimant's poisoning, but she led the subsequent internal investigation.

Ms. Culberson offered testimony that her investigation revealed claimant had a romantic relationship with Melissa Smith. Ms. Culberson further testified that claimant tried to break-off that relationship prior to the date of injury and she discovered that Ms. Smith keyed claimant's car. Ms. Culberson did not identify any specific witnesses or evidence she uncovered to document or prove either the existence of the romantic relationship or that Ms. Smith keyed claimant's car.

Mr. Culberson further testified that her internal investigation concluded that Mr. Henderson attempted to break off his relationship with Ms. Smith a couple of days before his poisoning. Ms. Culberson was not able to interview Ms. Smith because the Davenport police asked not to interview Ms. Smith. Ultimately, the Davenport Police Department did not actively pursue the investigation or file charges for claimant's poisoning. However, it should also be noted that perhaps the primary reason no criminal investigation was pursued is that clamant failed to cooperate with the Davenport Police Department's investigation. (Defendants' Ex. C)

Although she reached the conclusions she testified to after her investigation, Ms. Culberson and Kraft offered no specific individuals that told Ms. Culberson the information she was relaying. Nor did Kraft identify any specific evidence that Ms. Smith put chemicals into claimant's water bottle. Kraft certainly did not offer any direct evidence that Ms. Smith put the chemicals into the water bottle with the specific personal intention of poisoning Mr. Henderson.

While I am somewhat skeptical of the honestly and accuracy of the testimony of Mr. Henderson and Ms. Smith about the existence of a romantic relationship prior to the date of injury, the employer ultimately put in no direct evidence to establish that such a relationship existed. At best, the employer offered hearsay from Ms. Culberson derived from unknown or unspecified individuals that she relied upon to draw her speculations and conclusions about how claimant was poisoned. No witness with personal knowledge actually testified to a romantic relationship between claimant and Ms. Smith. I find that the employer failed to prove by a preponderance of the evidence that a

claimant was engaged in a romantic relationship with Melissa Smith prior to his date of injury.

Similarly, Kraft offered no direct evidence from a witness with personal knowledge that Mr. Henderson attempted to end a relationship with Ms. Smith days before his poisoning. Again, at best, the employer offered hearsay through Ms. Culberson of information obtained from unknown or unspecified individuals. The employer failed to prove that there was a break-up between Mr. Henderson and Ms. Smith days before the poisoning occurred.

The employer again offered no direct evidence of a person with personal knowledge to establish that Melissa Smith put chemicals into the water bottle claimant later consumed. Kraft had no surveillance cameras in the break area to determine who put the chemicals into the bottle. It offered no direct testimony or witness to put Ms. Smith at the scene of the poisoning. Kraft failed to prove by a preponderance of the evidence that Melissa Smith put chemicals into the claimant's water bottle or that she did so for reasons person to claimant.

Ultimately, I find that the employer offers a possible and perhaps plausible theory of how claimant's poisoning occurred. If the employer had proven a romantic relationship existed between Mr. Henderson and Ms. Smith and if the employer had proven that Mr. Henderson ended that relationship days before the poisoning, it may have been able to establish the likelihood that Ms. Smith poisoned claimant for reasons personal to claimant. However, there is simply no direct evidence to establish the romantic relationship, the termination of that relationship, or Ms. Smith's alleged act of putting chemicals into claimant's water bottle. Therefore, I find that the employer failed to prove by a preponderance of the evidence that Ms. Smith poisoned claimant and that it was for reasons personal to claimant.

I find that Mr. Henderson was poisoned at work as a result of ingestion of a cleaning chemical. At the time of his poisoning, claimant was in a location he was permitted to be and within his work break. The chemical that ultimately poisoned claimant was located at and part of his work environment at Kraft Heinz. I find that claimant proved he sustained a chemical ingestion and poisoning that arose out of and in the course of his employment at Kraft Heinz on July 18, 2020.

Following ingestion of the cleaning chemical, Mr. Henderson developed symptoms in his mouth, throat, chest, and stomach. The employer transported claimant to Genesis West Medical Center in Davenport. Unfortunately, the chemical caused significant swelling in claimant's esophagus, closing off his airway, and claimant required an emergent intubation to protect his airway. (Joint Ex. 1)

Genesis West Medical Center determined it was not equipped to deal with the chemical exposure and resulting reaction. Therefore, claimant was emergently transported to Saint Francis Medical Center in Peoria, Illinois for further treatment. (Joint Ex. 1,p. 9) Upon arrival at Saint Francis Medical Center, claimant was diagnosed

with acute respiratory failure with hypoxia due to the chemical ingestion. (Joint Ex. 2, p. 13) Claimant was placed into a medically induced coma to protect his airway. However, claimant was extubated without incident and discharged from the hospital on July 22, 2020. (Joint Ex. 3, p. 21)

Claimant followed-up with a local physician in Bettendorf on September 2, 2020. At that evaluation, claimant continued to complain of shortness of breath with exertion. However, the physician noted that claimant did not mention "anything related to esophagus or stomach" during his evaluation. (Joint Ex. 3, p. 27) The local physician released claimant to return to work on September 8, 2020, and he did return to work. (Joint Ex. 3, p. 32; Tr, pp. 37, 45-48) Claimant has not returned for further treatment since September 8, 2020.

Mr. Henderson testified that he remains short of breath, has difficulty lifting heavy items, has difficulties traversing ladders or stairs, continues to have acid reflux and uses Tums daily for that condition. Mr. Henderson also testified that he has changed his diet, giving up red meat and cigarettes since the ingestion of chemicals.

Mr. Henderson's treating physician released him to return to work without permanent medical restrictions on September 8, 2020. In fact, claimant did return to work for Kraft Heinz and continued to work in his pre-injury job at Kraft Heinz at the time of hearing. Claimant continued to work without restrictions, performing his typical job duties. Claimant's supervisor, Dale Tharp, testified that claimant is a good worker and continues to perform his full range of job duties without obvious incident or limitation. I accept that testimony as accurate.

Mr. Henderson sought an independent medical evaluation performed by Sunil Bansal, M.D., on June 18, 2021. (Claimant's Ex. 1) Dr. Bansal diagnosed claimant with an "[a]ccidental ingestion of caustic alkali (Lustre), with a chemical burn of the esophagus." (Claimant's Ex. 1, p. 4) Dr. Bansal did not directly comment on when Mr. Henderson achieved maximum medical improvement (MMI), but proceeded to conduct a permanent impairment assessment. Therefore, I find that Dr. Bansal found claimant to be at MMI and that he did not recommend further treatment for the injury. Dr. Bansal further opined that the chemical ingestion and subsequent reaction resulted in a seven percent permanent functional impairment of the whole person. Dr. Bansal did not impose permanent work restrictions, however. (Claimant's Ex. 1, p. 5)

Defendants also sought an independent medical evaluation, performed by Joseph Chen, M.D., on January 31, 2022. Dr. Chen concurred that the proper diagnosis is "a chemical burn to his esophagus after an accidental ingestion of an alkaline cleaning chemical at worko [sic]." (Defendants' Ex. D, p. 24) Dr. Chen also concurred with the local physician that Mr. Henderson achieved MMI on September 8, 2020. (Defendants' Ex. D, p. 24)

However, Dr. Chen disagreed with Dr. Bansal's impairment rating. Dr. Chen opined claimant qualifies for a two percent permanent functional impairment due to

claimant's "subjective complaints of dry mouth and esophageal reflux." However, he explained his disagreement with Dr. Bansal's rating, "Based upon the initial diagnostic studies performed at OSF Peoria, Mr. Henderson has not sustained nor would be expected to sustain any permanent esophageal or oropharyngeal tissue damage from his accidental chemical ingestion." (Defendants' Ex. D, p. 26)

Review of Table 6-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 121 and the corresponding examples demonstrate that there are not clearly identifiable criteria that would render either Dr. Bansal's impairment rating or Dr. Chen's impairment rating clearly accurate or clearly inaccurate. Both physicians place clamant into a "Class 1 impairment" in Table 6-3. That table provides a range for a Class 1 impairment from zero percent to nine percent of the whole person.

Both Dr. Bansal and Dr. Chen opine that Mr. Henderson sustained some permanent impairment. I find that claimant has proven he sustained permanent disability in some amount. Dr. Bansal provides no significant analysis of how or why he chose his seven percent permanent impairment, other than referring to Table 6-3. Dr. Chen provides an explanation why he does not believe the impairment is as high as specified by Dr. Bansal. Ultimately, I find Dr. Chen's impairment rating analysis is slightly more thorough. Dr. Chen's two percent permanent whole person impairment rating is accepted as the most credible and convincing in this evidentiary record.

As noted, claimant was released to return to work on September 8, 2020. He did return to work for Kraft. After returning to work, claimant worked in the same job, performing essentially the same job duties without restriction. He continued to work full-time and earned wages higher than those he was earning on the date of injury. Claimant correctly points out that his increased earnings are the result of receiving raises under the union contract governing his employment.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, claimant proved that he was at a location (the break room) where he was permitted to be and during a time he was permitted to be there. Claimant established by a preponderance of the evidence that the poisoning on July 18, 2020 occurred in the course of his employment. Claimant also established that the poisoning was the result of exposure to a chemical at work. Claimant also established that his poisoning arose out of his employment at Kraft.

Nevertheless, Kraft raised an affirmative defense, which if proven, would bar any recovery by claimant. Specifically, Kraft asserted that claimant was poisoned by a co-worker for reasons personal to claimant. Kraft relies upon Iowa Code section 85.16(3), which provides:

> No compensation under this chapter shall be allowed for an injury caused:
>
> (3) By the willful act of a third party directed against the employee for reasons personal to such employee.

To bar compensation, actions taken by a co-worker against the claimant must be intentional and the results of "influences originating entirely outside the working relation." Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 258 (Iowa 2010). Moreover, the employer must prove that the work environment did not substantially magnify the dispute resulting in an intentional injury at work. Id.

Kraft alleges claimant's injury occurred as a result of an intentional act by Melissa Smith. The employer asserts that Mr. Henderson and Ms. Smith were involved in a romantic relationship outside of work and that Mr. Henderson ended that relationship only days before the claimant's poisoning. Therefore, Kraft argues claimant's poisoning is the result of a lover's quarrel and originates as a result of a personal relationship but had nothing to do with work.

Indeed, the Iowa Workers' Compensation Commissioner has indicated that an intentional injury originating "as part of a lover's quarrel or due to some aspect of [a] romantic relationship" would clearly be a reason personal to the claimant and not compensable under Iowa Code section 85.16(3). Pearl v. Clerical Pros, File No. 1135264 (Appeal Decision August 2000). Therefore, if defendant was able to prove that claimant's poisoning was the result of a lover's quarrel, it may well have prevailed in this case. However, Kraft was not able to carry its burden of proof in this case.

In fact, Kraft was unable to prove by a preponderance of the evidence that Melissa Smith put the chemicals into claimant's water bottle. Kraft was unable to prove by a preponderance of the evidence that Mr. Henderson and Ms. Smith were involved in a romantic relationship. Kraft was also unable to prove by a preponderance of the evidence that Mr. Henderson ended that romantic relationship days before his poisoning. Ultimately, having reached these findings of fact, I conclude that Kraft failed to prove its affirmative defense. Therefore, claimant may recover benefits for his injury.

Claimant asserts a claim for permanent partial disability benefits. He produced a medical report from Dr. Bansal opining that he sustained permanent functional impairment. Defendants countered with an evaluation and opinion from Dr. Chen. Dr. Chen concurred that claimant sustained a permanent functional impairment, though he opined that it was less than the impairment rating offered by Dr. Bansal. Given that both physicians identified permanent functional impairment, I found that claimant proved he sustained permanent disability as a result of the July 18, 2020 poisoning.

The next disputed issue submitted by the parties is whether the claimant's permanent disability should be awarded on an industrial disability basis or based on claimant's functional disability. Iowa Code section 85.34(2)(v) provides in relevant part:

> [I]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Kraft asserts that claimant returned to work for the employer. The employer points out that claimant earns more now than he did at the time of his injury. Therefore,

Kraft contends that the plain language of Iowa Code section 85.34(2)(v) should result in an award of only functional permanent impairment.

Claimant concedes that he returned to work and that his hourly earnings are now greater than at the time of his injury. Claimant asserts that the raises he received since returning to work are automatic and the result of a union contract covering his employment at Kraft. Claimant contends that automatic union raises should not be considered to be earnings at or above the level of earnings at the time of the injury. Claimant offers no legal authority in support of this contention.

Kraft has the better of this argument. Claimant fails to produce any legal authority that supports his contention. Kraft's argument relies upon the plain language of the statute. While claimant's point is taken that an injured worker may not be "better off" after an injury but merely is benefiting from the provisions of a union negotiated contract, there is no language in Iowa Code section 85.34(2)(v) that suggests industrial disability benefits should be awarded unless the increase in earnings is due to claimant's merit after the injury date. Claimant's argument is more of a policy argument that should be urged before the Iowa legislature for a statutory change, if claimant disagrees with the statutory award of benefits.

I conclude that the plain language of Iowa Code section 85.34(2)(v) is clear. The Iowa legislature clearly intended that only functional permanent impairment be awarded when an injured worker returns to work at or above the earnings he or she received at the time of the injury. Mr. Henderson admits that he now receives more wages or earnings than he did at the time of his injury. Therefore, I conclude that claimant's recovery at this time is limited to the functional impairment ratings. Iowa Code section 85.34(2)(v).

Each party offered an expert opinion related to permanent functional impairment. Both physicians relied upon the same Table in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to derive and award permanent impairment. See Iowa Code section 85.34(2)(x). Ultimately, I found the opinion of Dr. Chen to be more thoroughly explained and the most convincing opinion in this evidentiary record.

Dr. Chen opined that claimant sustained a two percent permanent functional impairment. Claimant's injury is to an unscheduled body part (the esophagus). Accordingly, his permanent disability is awarded based on a 500-week schedule. Iowa Code section 85.34(2)(v). The award of permanent disability benefits is proportional to the functional disability in relation to the 500-week schedule. Iowa Code section 85.34(2)(w). Claimant proved a two percent permanent functional impairment. Two percent of 500 weeks is equivalent to 10 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v), (w). Therefore, I conclude claimant is entitled to an award of 10 weeks of permanent partial disability benefits.

Mr. Henderson also seeks award of the cost of his independent medical evaluation pursuant to Iowa Code section 85.39. Iowa Code section 85.39(2) provides

that an injured employee may be reimbursed by the employer for the cost of a medical evaluation. However, certain pre-requisites must be met before claimant qualifies for reimbursement under section 85.39.

First, reimbursement is only required of the employer if the claimant proves a compensable injury. Mr. Henderson has proven a compensable injury in this case. Next, a claimant must prove that a physician retained by the employer has performed an evaluation of permanent disability prior to the claimant's evaluation. In this instance, no physician retained by the employer offered an assessment of claimant's residual capabilities or permanent impairment until defendants had claimant evaluated by Dr. Chen on January 31, 2022.

Therefore, claimant did not qualify for reimbursement under Iowa Code section 85.39 until January 31, 2022. However, claimant obtained his evaluation with Dr. Bansal on June 18, 2021, before defendants obtained an evaluation. Claimant cannot establish this pre-requisite and does not qualify for reimbursement of Dr. Bansal's evaluation fee under Iowa Code section 85.39(2).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant seeks assessment of the cost of Dr. Bansal's evaluation and report as a cost pursuant to 876 IAC 4.33(6). The Iowa Supreme Court has clarified that the expense associated with an evaluation of the claimant cannot be assessed as a cost under 876 IAC 4.33(6). However, the Iowa Supreme Court held that the cost of authorizing an expert medical report can be submitted as a cost if the report is offered in lieu of the physician testifying live or via deposition. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015).

In this case, claimant submitted Dr. Bansal's invoice at Claimant's Exhibit 1, page 6. The entirety of substance of Dr. Bansal's invoice provides:

Description of Services:

Total Cost:

HENDERSON, Nolan……$1,562.00

It is not possible from this description of services to determine the expense allocated to Dr. Bansal's evaluation versus the expense of drafting his report in lieu of testimony. I am not willing to speculate on the proper break-down of these expenses. Therefore, I decline to assess the costs claimant requests.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant ten (10) weeks of permanent partial disability benefits commencing on September 8, 2020.

All weekly benefits shall be payable at the stipulated weekly rate of seven hundred forty-four and 17/100 dollars ($744.17) per week.

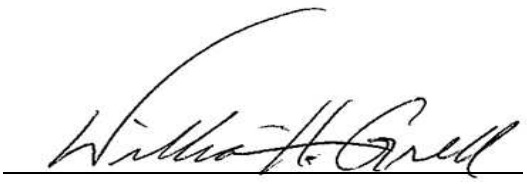
Defendants are entitled to the stipulated credit for weekly benefits paid to date.

Interest on any late paid weekly benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay all future causally related medical expenses.

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

Signed and filed this __31st__ day of October, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Hoffman (via WCES)

Peter Thill (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.