

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LARRY DRISCOLL,

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Self-Insured Employer,

Defendant.

FILE NO. 22001119.01

ARBITRATION

DECISION

HEAD NOTE NOS: 1101, 1102, 1107,
1109, 1402.30,
1801, 4000.2**STATEMENT OF THE CASE**

Claimant, Larry Driscoll, filed a petition in arbitration seeking worker's compensation benefits against City of Cedar Rapids, self-insured employer, for an alleged work injury date of April 8, 2021. The case came before the undersigned for an arbitration hearing on October 18, 2022. The case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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 evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 14, and Defendants' Exhibits A through G.

Claimant testified on his own behalf. Justin Koller also testified on behalf of claimant. Gretchen Barske testified on behalf of the employer. The evidentiary record closed at the conclusion of the evidentiary hearing on October 18, 2022. The parties submitted post-hearing briefs on December 1, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on April 8, 2021;
2. If so, whether a running award of temporary benefits is appropriate;
3. Payment of medical expenses;

4. Payment of an independent medical examination under Iowa Code section 85.39;
5. Alternate medical care under Iowa Code section 85.27;
6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and
7. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was 51-years-old. (Joint Exhibit 1, p. 1) Claimant is married with one adult daughter. (Hearing Transcript, p. 25) He is a high school graduate, and attended Kirkwood Community College where he earned a diploma in the water/wastewater environmental program in 1991. (Tr., p. 26; Claimant's Exhibit 3, p. 58) He later earned an associate's degree from Kirkwood in business management in 2011. (Cl. Ex. 3, p. 58)

Claimant worked for People's Natural Gas for about eleven years as an operator in water and wastewater systems. (Tr., p. 27) After that, he went to work for the City of Anamosa as the public works director for eight or nine years. In approximately 2012, he went to work for the City of Fort Madison as the public works director. (Tr., p. 28; Cl. Ex. 10, p. 78) In November of 2019, claimant was hired as the water distribution manager for the City of Cedar Rapids. (Tr., p. 28; Cl. Ex. 10, p. 79)

In his role as water distribution manager, claimant was responsible for protecting the water distribution system, including replacing fire hydrants and valves, repairing water main breaks, and managing the department's approximately 20 employees. (Cl. Ex. 10, p. 79) He testified that he spent about 90 percent of his time in the office, and the other 10 percent in the field, (Tr., p. 29)

Claimant has alleged a work-related injury occurred on April 8, 2021. On that date, claimant received Johnson and Johnson's Janssen COVID-19 vaccination. (Tr., pp. 30-32; Cl. Ex. 7, p. 69) About two weeks after receiving the vaccination, claimant began to experience adverse effects, discussed in more detail below. (Tr., p. 34) There is no dispute between the parties that the symptoms and diagnoses claimant has experienced since receiving the vaccine are causally related to the vaccine. The main issue to determine in this matter is whether his injuries, resulting from the vaccine, arose out of and in the course of his employment with the City of Cedar Rapids.

Gretchen Barske testified at hearing on behalf of defendant. I found Ms. Barske's testimony to be consistent with other evidence in the record, and her demeanor gave me no reason to doubt her veracity. I find she was a credible witness. Ms. Barske is the benefits manager for the City of Cedar Rapids, and was involved with the City's response to the COVID-19 pandemic. (Tr., pp. 88-89) Throughout the pandemic, she helped draft some of the City's healthy workplace leave policies, helped the City follow guidelines set forth by the Centers for Disease Control and Prevention (CDC), and helped keep track of CDC updates regarding COVID-19. (Tr., p. 89) Ms. Barske testified that the City's policy throughout the pandemic was to follow all CDC guidelines, including messages regarding vaccination.

Ms. Barske confirmed that City encouraged employees to get the COVID-19 vaccine. (Tr., p. 90) The City did not mandate the vaccine or host a vaccination clinic on City property at any time. Employees were not required to report their vaccination status to the City. (Tr., pp. 90-91) ¹ Ms. Barske testified that the City did reach out to Unity Point, a local medical provider, at some point inquiring about vaccinations. (Tr., p. 92) Subsequently, Unity Point contacted Ms. Barske on Thursday, April 1, 2021, with an email containing a link for city employees to schedule a vaccination. (Tr., p. 92; Defendant's Exhibit E, pp. 62-63)

The email Unity Point sent to Ms. Barske reads, in part, as follows:

We are reaching out to you because you are part of Phase 1A and Phase 1B, for COVID-19 vaccinations. Based on the survey completed by your organization, you have been linked to UnityPoint, St. Luke's – Work Well as a vaccination host site.

Your group may sign up to receive a vaccine from 8:00 AM – 4:30 PM at the Unity Point Health Community Vaccine Clinic, located at 717 A Avenue NE, Cedar Rapids (please enter on side facing Bank of the West).

Vaccinations will occur by appointment only, on a "first come, first serve basis" and we encourage you or your team to sign up as soon as possible.

(Def. Ex. E, pp. 62-63) The email then provides instructions for registration using a specific link to Unity Point's website, and indicates the link is for "specific organizations/individuals and should not be shared with family or friends." (Def. Ex. E, p. 63)

Over the next couple of days, Ms. Barske and the Unity Point representative emailed back and forth a few times to clarify some details, including that the link was only to be used by City employees and they should not share it with family and friends.

¹ There was a brief period in November 2021 when it appeared the federal government was going to require certain employees to be vaccinated or submit to weekly COVID-19 testing. During that time, the City began to gather required information regarding employee vaccinations. However, claimant no longer worked for the City at that time, and no such requirement came to pass.

(Def. Ex. E, pp. 60-62) Teresa Feldmann, Human Resources Director, sent an email to all City employees on April 5, 2021, as follows:

We have been notified by Unity Point that City employees are now eligible to register for appointments for COVID-19 vaccines through their clinic. Please follow the instructions below.

NOTE: When you click on the link provided below, it will say “if you were forwarded this scheduling link and did not receive it directly from UnityPoint health, please do not schedule an appointment.” This does not apply to you, as a City Employee. UnityPoint provided us with this link to share with our organization. However, you should not share with friends or family.

Your group may sign up to receive a vaccine from 8:00 AM – 4:30 PM at the Unity Point Health Community Vaccine Clinic, located at 717 A Avenue NE, Cedar Rapids (please enter on side facing Bank of the West).

Vaccinations will occur by appointment only, on a “first come, first serve basis” and we encourage you or your team to sign up as soon as possible.

(Cl. Ex. 5, pp. 62-63; Def. Ex. B, pp. 4-5) The email then provides the same instructions for registration using the Unity Point link. Ms. Feldmann then added: “As another resource, you can checkout (sic) VaccineFinder at <https://vaccinefinder.org>.”

Ms. Barske testified that the City did not have to pay for the vaccine clinic. (Tr., p. 92) If an employee expressed that they did not plan to get the vaccine, Ms. Barske said the city would advise that it is each employee’s choice and not mandatory. (Tr., p. 94) The City offered a healthy workplace leave policy, which Ms. Barske said was modeled after the federal COVID relief program. (Tr., pp. 95-96) The City chose to continue the program once the federal program ended. Part of that program allowed City employees to take up to two hours of paid time off work in order to get a COVID-19 vaccine. Claimant testified that as a manager, he did not have to “punch a clock” to leave work, so he did not directly use the healthy workplace leave when he received his vaccine. (Tr., pp. 62) He did receive the vaccine during regular work hours, at the Unity Point clinic.

There is no dispute between the parties that the City did not mandate that employees get vaccinated. (See Tr., pp. 13-14; 58; 90) The parties also agree that the City “encouraged” employees to get vaccinated. The question is whether that encouragement rose to such a level that claimant’s injury arose out of and in the course of his employment.

Justin Koller testified on behalf of claimant. Mr. Koller was employed by the City of Cedar Rapids from 2013 until April of 2022. (Tr., pp. 9-10) From 2016 until he left the City, he was the sewer operations manager, and like claimant, he oversaw other

employees in his department. (Tr., pp. 10-11) He knew claimant and at times collaborated with him when their work overlapped. (Tr., p. 11) I found Mr. Koller's testimony to be consistent with other evidence in the record, and his demeanor gave me no reason to doubt his veracity. I find he was a credible witness.

Mr. Koller testified about the emails and newsletter that the City sent to employees over the course of the COVID-19 pandemic. (Tr., p. 12) He recalled receiving multiple emails concerning COVID, as well as vaccination times and locations. (Tr., p. 13) While he agreed that the City did not mandate vaccines, he felt the City strongly encouraged employees to get the vaccine. (Tr., pp. 13-14) He testified that during manager's meetings, which claimant also attended, there was conversation regarding the benefits of the vaccine, as well as conversation regarding how to work with vaccinated versus unvaccinated people. (Tr., p. 14) He stated this was "an ongoing conversation that would have spanned across the date that we're talking about [April 2021], and it was multiple conversations over time within that '20 to '21 year." (Tr., pp. 21-22) He did not recall feeling more pressure as a manager to get the vaccine, but thought the City "strongly encouraged" all employees to get the vaccine. (Tr., p. 15) He testified that he received a vaccine, like claimant, using an email he received from the City with the link to register at Unity Point. (Tr., pp. 17, 20)

With respect to the emails and newsletters the City provided to employees, Mr. Koller agreed that the City followed CDC guidelines with respect to COVID-19 protocols, including masking and social distancing. (Tr., pp. 18-19) He testified that in April of 2021, if an employee was not wearing a mask, there would be remedial action. (Tr., p. 23) However, there was no remedial action if an employee did not get vaccinated, as it was not required. Finally, he testified that he did not feel the City was "overbearing" with respect to vaccinations, but that "it was a continuous message that was routinely recited, but not overbearing." (Tr., p. 23)

Claimant testified and also agreed that the City at no time actually mandated that employees receive a vaccine. (Tr., p. 58) He also agreed that several newsletters and emails were sent to employees encouraging vaccination. He did not receive the vaccine on City property, but scheduled it through the link provided in the April 5, 2021 email. (Tr., p. 59) He agreed that he likely would have been eligible to receive a COVID-19 vaccination earlier than April 5, 2021, but did not really look into it prior to that time. (Tr., p. 60) He also acknowledged that access to the vaccine prior to that time was limited and it could be difficult to find. (Tr., pp. 60-61) He was not provided with any incentive or additional monetary payment to get the vaccine, but he did go during work hours. (Tr., pp. 61-62) He was aware of the healthy workplace leave policy, but did not use it due to his status as a manager. (Tr., p. 62)

Claimant testified, both at his deposition and at hearing, that he decided to get the vaccine because he felt it was the right thing to do. (Tr., p. 66; Cl. Ex. 2, p. 39; Deposition Transcript, p. 22) At his deposition, claimant testified that while the City did not mandate the vaccine, it was "highly encouraged to get the vaccine to protect yourself and my department, I mean, there's 21 guys in my department." (Cl. Ex. 2, p.

39; Depo. Tr., pp. 21-22) He testified that when he received the email that the City “secured or sponsored” a vaccine clinic at Unity Point, he spoke to the supervisor of the department:

The City sent out an email that they secured or sponsored a vaccine shot at Unity Point, and when I met with the supervisor of the department we both felt that it was – I’d say at least myself felt that at that time that we needed to protect my guys as much as we could. We followed all the City safety guidelines for COVID. And I felt that it was the proper thing to do since we’re all essential workers and we were there at-site all the time, and you know, the City secured these vaccines for City employees. And I just felt that it was a good option for me to lead the department to just ensure that my guys didn’t get sick from me.

(Cl. Ex. 2, p. 39; Depo. Tr., p. 22) Claimant later testified that prior to receiving the email at work, he was not really interested in getting a vaccine. (Cl. Ex. 2, p. 39; Depo. Tr., p. 23) However, “the more the CDC and the City came out with guidelines, that was the honorable thing to do.” (Cl. Ex. 2, p. 39; Depo. Tr., pp. 23-24) Claimant registered for the vaccine using the link in the email he received from the City, using his work computer while he was at work, and went to the clinic and received the vaccine during work hours as well. (Cl. Ex. 2, pp. 45-46; Depo. Tr., pp.48-50)

At hearing, claimant testified that at the time he received the vaccine, his wife had already been vaccinated. (Tr., p. 66) Both her job in a medical clinic and a personal health condition made her eligible for the vaccine at an earlier time. (Tr., p. 86) Claimant testified that in the spring of 2021, other than going to work, he and his wife did not venture out often. (Tr., p. 66) He said he felt “a little bit of peer pressure” at work to get vaccinated, as it was talked about a lot in manager meetings, and he felt he “owed it” to his department to get vaccinated. (Tr., p. 68) He agreed that wearing a mask was mandated while working, unless working outdoors alone. (Tr., pp. 69-70) If an employee was not wearing a mask, he was to ask the employee to put it on and contact human resources.

The parties included several of the emails and newsletters referenced in testimony as exhibits.² The first email in evidence is from Human Resources Director Teresa Feldmann, dated December 29, 2020, and is addressed to all City employees. (Def. Ex. B, p. 2) The email contains a notification that two city employees had recently tested positive for COVID-19. The email also notes that Ms. Feldmann had started to receive questions regarding COVID vaccines, and how that may impact City policies and processes. She advised that it was a new topic that was continually evolving, and she would keep everyone informed of any changes that might impact the workforce. She also provided a link to a questions-and-answers section of the CDC website regarding vaccines and discontinuing the use of masks.

² Claimant’s Exhibits 5 and 6 are duplicative of documents included in Defendant’s Exhibits B and C. This decision will only reference Defendant’s Exhibits for clarity.

The next email in the record is dated March 19, 2021. (Def. Ex. B, p. 3) The email notes that the first two weeks in March were the longest the city had gone with no positive COVID cases in the past seven months, but then notifies of several employees who had tested positive that week. The second paragraph of the email states:

The City of Cedar Rapids is encouraging all employees to get the COVID-19 vaccine for your health, as well as the health and safety of your family, co-workers, and the community you serve. Beginning April 5, 2021, all Iowans will be able to locate the vaccine at a pharmacy or healthcare provider, regardless of their employment.

(Def. Ex. B, p. 3) The email then provides a link for additional information, but the link's destination is not visible in the printout of the email. Finally, the last email in evidence is the email from April 5, 2021 with the link to register for a vaccine, which is discussed in detail above. (Def. Ex. B, pp. 4-5)

Defendant also provided copies of the City of Cedar Rapids newsletters between January 18, 2021 and May 10, 2021. (Def. Ex. C) The newsletter from January 18, 2021 includes a paragraph regarding the Vaccine Distribution Team:

The City has established an internal team to work on a plan for the roll out of COVID-19 vaccinations for City employees. We don't have a timeline for when vaccines will be available, but are working to be prepared so distribution goes smoothly. We will provide more information as the plan is developed.

(Def. Ex. C, pp. 6-7)

The February 1, 2021 newsletter begins with an announcement that the City created a COVID-19 Vaccine Task force. (Def. Ex. C, pp. 8-9) It states that the task force was created "to make sure that City employees have the latest information and appropriate plans for vaccination opportunities when the COVID-19 vaccine is made available through Linn County Public Health." (Def. Ex. C, p. 9) It then discusses the various phases of vaccine distribution, and explains that the task force was working with the Iowa Department of Public Health "so that as soon as vaccines are available, we can provide City employees with an opportunity to be vaccinated." The February 8, 2021 newsletter provided an update regarding vaccine eligibility for law enforcement officers, and notes that the City continued to work with Linn County Public Health "to make sure that eligible employees get a vaccine opportunity as soon as they are eligible." (Def. Ex. C, pp. 10-11)

On March 1, 2021, the City's Vaccine Task Force provided an update. (Def. Ex. C, pp. 12-15) The notice states that the task force was continuing to work with Linn County Public Health and other healthcare professionals to provide the most up-to-date information on vaccine availability. (Def. Ex. C, p. 14) It states that the "health and safety of our employees is our primary concern." It also states:

The COVID-19 vaccine is not mandatory, however the City of Cedar Rapids is encouraging employees to get the vaccine. The supply of COVID-19 vaccine is limited, therefore, an opportunity to receive the vaccine through your employer because of your occupation (identified through the Iowa Department of Public Health's tiered prioritization) may be several months before you are otherwise eligible or have access to the vaccine.

(Def. Ex. C, p. 14) (emphasis added). The notice then lists several benefits to getting the vaccine, according to the CDC, including preventing COVID-19; reducing the severity of illness if COVID-19 is contracted; protecting the people around you, especially those at risk for severe illness; and preventing the spread of COVID-19. The notice also states that vaccination is a safer way to help build protection, and explains that the benefits of the vaccine outweigh the known and potential risks.

The task force update continues by noting that vaccination will be "an important tool to help stop the pandemic." (Def. Ex. C, p. 15) It states that the "combination of getting vaccinated and following CDC's recommendations to protect yourself and others will offer the best protection from COVID-19." (Def. Ex. C, p. 15) (emphasis in original) Finally, the update contains a projected vaccination timeline chart from the Iowa Department of Public Health (IDPH) showing the estimated timeline for various population groups across the state.

There is also a flyer, which states it is from Health Solutions "your health and wellness partner," which states in large, block letters: "It's more than hands, face, and space. VACCINATE." (Def. Ex. C, p. 13) (capitalization in original) (Hereinafter referred to as "Health Solutions vaccine flyer") At the top of the flyer is a graphic of a small orange circle with the words "I got my Covid-19 vaccine!" and a picture of a bandage and a check mark in the shape of the letter V. It also states: "We ask you to join us in protecting yourself, your family and friends, and our community by getting vaccinated. Stopping the COVID pandemic requires using ALL the tools we have available and IT TAKES EVERYONE." (capitalization in original) Under that text, there are 4 large graphics, each a circle, depicting a mask, social distancing, hand-washing, and a vaccine syringe. Finally, under those graphics is additional text that reads: "We want everyone in our community to be safe and get back to hugging our families and friends and shaking hands with our neighbors. We all play a part in this effort, and you are key."

On March 8, 2021, the City shared another vaccination update. (Def. Ex. C, pp. 16-20) It included the same Health Solutions vaccine flyer as the previous update. (Def. Ex. C, p. 17) It provided an update regarding individuals then eligible for vaccines, including those 64 years of age and younger with medical conditions who are or may be at an increased risk of severe illness from COVID-19. (Def. Ex. C, p. 18) It also notes that Linn County Public Health was not able to provide vaccinations for those individuals at that time, but pharmacies and other facilities may have the vaccine available. It states: "We encourage you to schedule an appointment directly with a pharmacy if you

are eligible.” It then provides links for information about how to get a vaccine, and information regarding pre-existing conditions that qualify individuals for the next phase of vaccination.

The update continues with the following statement:

The City of Cedar Rapids is encouraging you to get vaccinated. Please contact your physician if you have any questions or concerns about the vaccine. We encourage all employees who are eligible for a vaccine to schedule an appointment and get vaccinated for your health, the health of your loved ones, and for the community you serve.

Please remember if you were previously eligible for the COVID-19 vaccination and declined, you may still decide to get vaccinated. You may schedule an appointment through a vaccine provider or let your supervisor know you would like to be vaccinated when additional vaccinations are available through the City.

(Def. Ex. C, p. 19) The update also notes that it is “critical” to continue practicing mitigation measures to slow the spread of COVID-19, and provided a list of such measures, including getting a vaccine when eligible. Under that information is an updated vaccination timeline chart from IDPH.

Finally, the last page of the update is a flyer from IDPH featuring a color photograph of an elderly man, with information on helping “your loved one” get a COVID-19 vaccine. (Def. Ex. C, p. 20) The flyer provides information, including websites and phone numbers, for help getting older Iowans a vaccine.

On March 15, 2021, the City provided another update. (Def. Ex. C, pp. 21-25) It included another Health Solutions flyer, very similar to the prior flyer, but with additional text regarding vaccines rather than the four circular graphics. (Def. Ex. C, p. 22) Much of the text is the same, with some additional information about the effectiveness of the vaccines available and side effects. The update states again that the City “is encouraging employees to get the COVID-19 vaccine,” and encourages employees who are eligible to schedule an appointment “and get vaccinated for your health, the health of your loved ones, and for the community you serve.” (Def. Ex. C, p. 23) Much of the same information is provided regarding where to find a vaccine and pre-existing conditions that qualify for a vaccine. (Def. Ex. C, pp. 23-24) Finally, the same IDPH flyer providing information to help older Iowans was also included. (Def. Ex. C, p. 25)

On March 22, 2021, the City provided a shorter update. (Def. Ex. C, pp. 26-28) The notice states, in part:

The City of Cedar Rapids is encouraging all employees to get the COVID-19 vaccine for your health, as well as the health and safety of your family, co-workers, and the community you serve. Beginning April 5, 2021, all

Iowans will be able to locate a vaccine at a pharmacy or healthcare provider regardless of their employment. Although the City has offered to host a vaccination clinic, it is unlikely that supply will be allocated from Linn County Public Health before most employees would be able to get a vaccine on their own at a pharmacy or healthcare provider.

(Def. Ex. C, p. 27) The notice again provides a link to a COVID-19 vaccine finder website, and also provides a summary of the Healthy Workplace Leave Policy, which allowed employees to use up to 2 hours during normal work hours to get a COVID-19 vaccination. At the bottom, there is a graphic with a color photograph of a young woman wearing a mask, with the same orange “I got my Covid-19 Vaccine!” graphic next to her head, and the words “You Are Essential” over her torso. Under the graphic it states “Getting a COVID-19 vaccine adds one more layer of protection.” next to the CDC’s website address. Finally, the update also includes the second version of the Health Solutions vaccine flyer. (Def. Ex. C, p. 28)

The next update was provided on March 29, 2021. (Def. Ex. C, pp. 29-31) The update starts with the sentence: “COVID-19 vaccine: It’s our turn to roll up our sleeves and get vaccinated!” in boldface font. (Def. Ex. C, p. 30) There is a graphic to the right with a color photograph of a woman wearing a mask and short-sleeved shirt, posing with her left arm flexed, pointing at a bandage on her upper arm where a vaccination would typically be injected. The update also states, in part:

You’ve kept our city running through one of the most challenging times in our history. The responsibility is ours, as a community, to help stop this virus. Now we have a safe and effective tool to help us do that – COVID-19 vaccines.

It takes everyone.

We all need to step up to beat COVID-19. We ask you to join us in protecting your community by getting vaccinated.

Getting vaccinated adds one more layer of protection for you, your coworkers, your family, and your loved ones.

. . .

Stopping a pandemic requires using all the tools we have available - wearing masks, social distancing, washing hands frequently, and **getting vaccinated.**

We want the pandemic to be over. We want you all to feel safe at work and in your community and to be able to shake hands with your coworkers.

We all play a part in this effort, and you are key. Beginning April 5, 2021, all Iowans will be able to locate a vaccine at a pharmacy or healthcare provider regardless of their employment. Although the City has offered to host a vaccination clinic, it is unlikely that supply will be allocated from Linn County Public Health before most employees would be able to get a vaccine on their own at a pharmacy or healthcare provider.

(Def. Ex. C, p. 30) (emphasis in original) The notice then provides the same information as prior updates regarding a vaccine finder website and the Healthy Workplace Leave Policy. Finally, the second version of the Health Solutions vaccine flyer is again included. (Def. Ex. C, p. 31)

The next update was provided on April 5, 2021, which is the same date the email with the link to register for a vaccine at Unity Point was sent to all City employees. (Def. Ex. C, pp. 32- 35) The update starts with a large heading in bold font that states, in all caps, "VACCINATION OPPORTUNITIES OPEN TO ALL IOWANS EFFECTIVE APRIL 5, 2021." (Def. Ex. C, p. 33) The update notes that while vaccine supply is increasing, "supply is still limited, so persistence and patience are important factors to consider when seeking a vaccination opportunity." The notice again provides website links and phone numbers for resources to help locate vaccines, and again notes that while the city offered to host a vaccine clinic, it was unlikely to be allocated supply. It then states, again in bold font: "We encourage you to contact your primary care physician. Several employees have been able to contact their physician and get a vaccination appointment scheduled." Information about the Healthy Workplace Leave Policy is repeated.

The next page of this update contains "Myths and Facts about COVID-19 Vaccines." (Def. Ex. C, p. 34) It briefly explains that the vaccine does not contain live virus and cannot make a person sick with COVID-19, and how it works in the body and why it is important. Finally, the second version of the Health Solutions vaccine flyer is again included. (Def. Ex. C, p. 35)

On April 12, 2021, the update begins with a sentence, again in bold font and fully capitalized, stating: "THE CITY OF CEDAR RAPIDS ENCOURAGES YOU TO GET VACCINATED!" (Def. Ex. C, pp. 36-37) It also contains the following:

City Employee Vaccination Opportunity through UnityPoint Health

City employees are eligible to register for appointments for the COVID-19 vaccine through the UnityPoint Health Clinic. Please note that when you click on the link provided below, it will say "If you were forwarded this scheduling link and did not receive it directly from UnityPoint health, please do not schedule an appointment." This does not apply to you, as a City employee. UnityPoint provided us with this link to share with our organization. However, you should not share with friends or family.

Your group may sign up to receive a vaccine from 8:00 AM – 4:30 PM at the Unity Point Health Community Vaccine Clinic, located at 717 A Avenue NE, Cedar Rapids. Please enter on the side facing Bank of the

West. Vaccinations will occur by appointment only, on a “*first come, first serve basis*” and we encourage you or your team to sign up as soon as possible.

(Def. Ex. C, p. 37) (emphasis in original) The notice then provides the same instructions for registration as provided in the April 5 email, and again repeats information regarding vaccine-finder websites and the Healthy Workplace Leave Policy. Once again, the second version of the Health Solutions vaccine flyer is provided. (Def. Ex. C, p. 38)

The next update on April 19, 2021, is essentially the same. (Def. Ex. C, pp. 39-41) It again begins with the information regarding the “City Employee Vaccination Opportunity through UnityPoint Health.” (Def. Ex. C, p. 40) It also states at the beginning of the update that vaccine supply is continuing to increase, so vaccination opportunities are becoming less stressful to schedule. It also contains a new paragraph noting that Linn County Public Health held a vaccination clinic the prior weekend, and additional vaccination clinics would be announced on their website. It states: “Most City of Cedar Rapids employees will likely find the best opportunity to get a vaccination is through the UnityPoint Health Clinic, a pharmacy, or through your healthcare provider.” The information regarding the Healthy Workplace Leave Policy, as well as the Health Source vaccine flyer, are again included. (Def. Ex. C, pp. 40-41) The remaining updates, issued on April 26, 2021, May 3, 2021, and May 10, 2021, appear to be identical to the April 19 update. (Def. Ex. C, pp. 42-47) The Health Solutions vaccine flyer was not included with these updates, however.

While the City did not mandate that employees receive a COVID-19 vaccination, based on testimony and other evidence submitted, I find the City strongly encouraged or urged employees to receive a vaccine. First, the fact that the City created a Vaccine Task Force to ensure City employees “have the latest information and appropriate plans for vaccination opportunities” shows that the City wanted its employees to be vaccinated as soon as possible. (Def. Ex. C, p. 9) Additionally, of the thirteen newsletters/updates provided in evidence, spanning about four months’ time, eleven of those specifically state that City employees are encouraged to get vaccinated. (See Def. Ex. C, pp. 12-47) The same/similar Health Solutions vaccine flyer was included on at least eight occasions. (Def. Ex. C, pp. 13, 17, 22, 28, 31, 35, 38, 41) Only one newsletter, on March 1, 2021, stated that vaccines were not mandatory. (Def. Ex. C, p. 14) In the same sentence, however, it is noted that the City is encouraging employees to get the vaccine. Again, while the parties agree that vaccines were not mandatory, the overwhelming message from the City was that employees should get a vaccine as soon as they were eligible and could secure an appointment.

The newsletters and emails from the City to employees also note with frequency the reasons vaccines were being encouraged. There are several instances noted above in which the benefits of vaccination are explained,

including the desire to end the pandemic, and protect the health of the employees, their loved ones, and the community the employees serve. Using language such as “it takes everyone,” “it’s our turn,” “join us in protecting your community,” “we all play a part in this effort, and you are key,” and similar such language is exactly what “strong urging” looks like. There is no question that the City strongly urged employees to get the COVID-19 vaccine as soon as possible.

Additionally, the City’s updates frequently noted that vaccine supply was limited up until the April 19 update, when supply had finally started to increase. This made the opportunity for City employees to sign up through the Unity Point link a more convenient way to secure a vaccination appointment.

The City had good reason to encourage employees to get vaccinated, and it’s actions are commendable. That being said, the benefits to the City in having a vaccinated workforce cannot be ignored, and are important to the legal analysis below.

The pandemic clearly affected employee attendance, as noted in the March 19, 2021 email from Ms. Feldmann to all employees. (Def. Ex. B, p. 3) In that email, she notes that the first two weeks in March were the longest the City had gone in seven months with no positive COVID cases among employees. However, at that time six employees were reporting positive results. Clearly, vaccination would decrease absenteeism, as fewer people became ill from the virus, and those who did become ill would likely suffer a shorter and less serious illness, therefore missing less time from work.

There are additional benefits to employee relations and morale when considering the COVID-19 vaccine. The City often notes its desire to see the pandemic end for the health and safety of its employees, along with desires to protect others in the community, feel safe at work, and “be able to shake hands with your coworkers.” (Def. Ex. C, p. 30) When it comes to claimant specifically, he testified that he felt a little bit of peer pressure, but also felt he owed it to his department to get vaccinated. (Tr., p. 68) He felt it was “the proper thing to do” as a manager and an essential worker, and did not want his employees to get sick. (Cl. Ex. 2, p. 39; Depo. Tr., p. 22) Providing City employees with a specific link, only for their use, to register for a vaccine at a time when supply was limited and appointments were difficult to find surely boosted employee morale and improved employee relations.³

Based on all of the evidence in the record, I find that the City strongly urged all City employees to receive a COVID-19 vaccination. In addition, there were mutual benefits between the employer and employees, including decreased absenteeism and improved employee relations. As such, I find that claimant’s injury arose out of and in the course of his employment with defendant employer.

³ While Ms. Barske testified there were a few employees who were not happy about the City “pushing” the vaccine, she indicated it was “maybe a handful” out of 1,400 employees. (Tr., pp. 93-95)

The parties do not dispute that claimant has not reached maximum medical improvement (MMI), and permanent disability benefits are not yet ripe for consideration. Claimant has requested a running award of temporary total disability benefits (TTD). Defendants argue that claimant is not entitled to a running award, as he is capable of returning to substantially similar work.

Claimant testified that before receiving the vaccine on April 8, 2021, his physical condition was “very, very good.” (Tr., p. 44) He said that he would run or walk fast at least 15 miles per week and engaged in physical activity. Two weeks after receiving the vaccine, he woke up and his left arm was limp and he had pain in the back of his knees. (Tr., p. 34) He went to work that day, but his symptoms continued to progress. The next day, his symptoms were spreading to his shoulders and into his neck, so after work he presented to an urgent care clinic. A few days later, on or around April 25, 2021, he developed left facial and eyelid drooping with facial numbness and slurred speech. (Cl. Ex. 1, p. 3) His wife feared he was having a stroke, so he returned to urgent care, where he was prescribed prednisone and muscle relaxers.

On April 27, 2021, claimant saw Michael Gomendoza, M.D. (Joint Exhibit 2, p. 10) After examination, Dr. Gomendoza opined that claimant seemed to have left-sided Bell’s palsy, and also evidence of hyperacusis on the left ear and tenderness of the left ear canal. (Jt. Ex. 2, p. 16) An MRI of the brain showed symmetric enhancement of 7 cranial nerve bilaterally, confirming bilateral Bell’s palsy. Claimant was initially diagnosed with Lyme disease, but that test was later found to be negative. (Cl. Ex.1, pp. 5-6) Claimant continued to experience a variety of symptoms, including neck and shoulder pain, and numbness and pain in the lower extremities and fingers. (Cl. Ex. 1, pp. 6-7) His facial palsy improved, and he started to believe his condition was improving around May 11, 2021. (Cl. Ex. 1, p. 7) However, he continued to have difficulties, and asked human resources if he could use the Healthy Workplace Leave Policy if he could prove his symptoms were related to the COVID-19 vaccination. (Cl. Ex. 1, pp. 7-8) To that end, Dr. Gomendoza provided a letter dated May 14, 2021, noting that claimant had been having muscle aches, joint pain, and generalized weakness beginning two weeks after his vaccine. (Jt. Ex. 2, p. 26) While he was still undergoing further workup for the cause of his symptoms, Dr. Gomendoza wrote that there was a “high suspicion” that his symptoms were related to the vaccine.

Around this same time, claimant was terminated from employment for showing “unprofessional and unacceptable behavior by yelling and using profanity toward two of your subordinates.” (Def. Ex. F, p. 65) After a discussion between claimant and human resources, his employment was terminated effective May 19, 2021. (Tr., pp. 48-49)

Following his termination from employment, claimant continued to treat for his symptoms. He was in physical therapy and his musculoskeletal symptoms

were improving. (Cl. Ex. 1, pp. 9-10) However, on June 9, 2021, he saw Dr. Gomendoza for possibly recurrent Bell's palsy. (Cl. Ex. 1, p. 10; Jt. Ex. 2, p. 33) Claimant and his wife also began to suspect he had Guillain-Barre syndrome (GBS), and claimant was referred to neurologist Thomas Rogers, D.O., who he first saw on June 16, 2021. (Jt. Ex. 4, p. 113) Dr. Rogers thought he likely did have GBS, but decided to hold off on aggressive treatments since his condition was improving at that time. He did, however, order an EMG, which was scheduled to take place in August.

When claimant returned to Dr. Gomendoza on July 9, 2021, he reported continued weakness, and the inability to work. (Jt. Ex. 2, p. 41) He was able to lift 10 to 15 pounds with both upper extremities, but no more. (Jt. Ex. 2, p. 42) His gait was unsteady, and he was using a cane occasionally. He was unable to use stairs due to lower extremity weakness. He expressed frustration due to being unable to find a job or go to work. By that time, he had also reported his symptoms and possible reaction to Johnson and Johnson, but had not received any support or advice. He also inquired about disability, and Dr. Gomendoza suggested he pursue it because his symptoms were hindering him in getting a job. (Jt. Ex. 2, p. 47)

As his situation was not improving, Dr. Rogers moved claimant's EMG up, and it took place on July 14, 2021. (Jt. Ex. 4, p. 131) The EMG showed acquired predominantly demyelinating polyneuropathy with signs of axonal damage. (Jt. Ex. 4, p. 132) Dr. Rogers recommended a lumbar puncture for further evaluation, which was done the same day. (Jt. Ex. 4, p. 133) Following the lumbar puncture, claimant was diagnosed with chronic inflammatory demyelinating polyneuropathy (CIDP), and IVIG treatment was recommended. (Jt. Ex. 4, p. 134) ⁴ While waiting for the treatment to be approved, claimant's condition continued to deteriorate. (Jt. Ex. 4, pp. 135-139)

Claimant's IVIG treatment was finally approved, and his first infusion took place on July 28, 2021. (Jt. Ex. 4, p. 140) At that time he was getting progressively weaker, with both proximal and distal muscle weakness worse on the left. His reflexes were also more depressed. He tolerated the IVIG well, and was to continue with treatments every three weeks while continuing physical therapy. (Jt. Ex. 4, p. 143)

Claimant also treated with Michael Powell, D.C., a chiropractor who specializes in functional neurology. (Jt. Ex. 6) Dr. Powell's records document claimant's symptoms, including his ongoing pain and weakness, over the course of his treatment. (Jt. Ex. 6, pp. 164-251) On September 7, 2021, Dr. Powell authored a letter indicating that claimant's condition was disabling. (Jt. Ex. 6, p. 208) He was able to sit unassisted with mild to moderate pain, but walking, lifting, carrying, reaching, pulling, and pushing were all impaired. He had significant weakness, especially in his legs, with bilateral foot drop. He needed to use a

⁴ CIDP is sometimes considered a chronic form of Guillain-Barre syndrome. (Cl. Ex. 1, p. 13)

cane or walker to walk more than a few steps or on any uneven surface on most days. His balance was poor, and he was at risk of falling. He also experienced weakness in his hands and arms, less severe than his legs, but his upper extremities were more painful than the lower. After any physical activity, he experienced much worse pain, general weakness, and fatigue, for anywhere from several hours to two days.

Claimant saw Dr. Gomendoza on September 23, 2021. (Jt. Ex. 2, p. 48) At that time he had completed four doses of IVIG infusions. He noted claimant was ambulating with a cane, but had previously been using a walker for about two months. (Jt. Ex. 2, pp. 48-49) He continued with physical therapy, and while his gait remained unstable, he noted some improvement. (Jt. Ex. 2, p. 49) Dr. Gomendoza noted claimant was very tremulous when trying to stand still, and had tremors in both upper extremities causing difficulty with writing and using a computer. Dr. Gomendoza advised claimant to continue with physical therapy, and noted while he had shown some improvement, he still had a lot of neurologic abnormalities and was still quite unstable and tremulous. (Jt. Ex. 2, p. 55)

Claimant continued with regular physical therapy, visits to Dr. Powell, and IVIG treatments. (See Jt. Exs. 4, 5, 6) On December 1, 2021, he told Dr. Rogers that he was seeing benefits from the IVIG treatments and regaining strength. (Jt. Ex. 4, p. 150) There is a note from Dr. Rogers dated January 19, 2022 that states he cannot state for certain whether the CIDP was caused by the Johnson and Johnson vaccine. (Def. Ex. A, p. 1) He continued to note very gradual improvement in his condition, however by March 23, 2022, Dr. Powell authored a letter requesting a handicap parking designation, due to claimant's severe ankle, leg, and torso weakness. (Jt. Ex. 6, p. 234) Claimant's condition put him at high risk for falls due to weakness, balance issues, and pain, and his legs were prone to fatigue very quickly when walking.

On April 13, 2022, claimant told Dr. Powell that his legs had gotten weaker and ankles tighter over the past couple weeks. (Jt. Ex. 6, p. 239) He said it was the first time in months he felt he had regressed for more than a day or two. On May 31, 2022, claimant was seen at the Hanger Clinic for custom ankle foot orthoses (AFOs). (Jt. Ex. 7, p. 252) He reported a lot of pain and sensitivity in his lower extremities, and difficulty wearing a sock and shoe, along with his unstable gait. (Jt. Ex. 7, pp. 254-255) The record also notes that claimant's physical therapist had noted claimant's "significant decline" in the past couple of months, as he developed a severe plantarflexion contracture and in-toeing of his left side. (Jt. Ex. 7, p. 256) He also noted claimant's gait had become more unstable, his left ankle rolled laterally, and he was unable to get his heel to the ground. Claimant received his custom AFOs on June 27, 2022, and at his follow up on July 8, 2022 he was doing well with them. (Jt. Ex. 7, pp. 260-266) He was having fewer falls and felt much more stable in ambulation and standing. (Jt. Ex. 7, p. 266)

On August 24, 2022, claimant saw Dr. Rogers for follow up. (Jt. Ex. 4, p. 152) The record notes that at claimant's prior visit, his improvement seems to have leveled out with IVIG, so he ordered a repeat EMG. The EMG revealed more axonal damage compared to his previous study, and he still had signs of demyelination. He had gained strength with the IVIG, however, so they decided to continue the treatments but decrease the frequency. He was to follow up if he felt the dose needed to be increased again.

On June 24, 2022, claimant had an independent medical evaluation (IME) with John Kuhnlein, D.O. (Cl. Ex. 1, p. 1) Dr. Kuhnlein's report is dated September 19, 2022. Dr. Kuhnlein performed a detailed review of the medical records. (Cl. Ex. 1, pp. 2-17) At the time of Dr. Kuhnlein's examination, claimant reported multiple ongoing symptoms, including intermittent neck pain radiating into the right trapezius with muscle spasms, sacral pain, bilateral hip pain, worse on the right, fasciculations in both thighs extending to the mid calves, bilateral foot drop, nerve pain in his calves, atrophy in the left calf, decreased range of motion and pain in the left ankle, and nerve pain in both feet. (Cl. Ex. 1, pp. 17-18) He described problems with prolonged travel due to the sacral and trapezius pain; problems getting in and out of the shower; and problems with writing and typing. (Cl. Ex. 1, p. 18) He also described issues with standing, sitting, reclining, walking, and using stairs due to his lower extremity issues. He had problems with material handling activities due to issues with feeling in his fingers.

On physical examination, Dr. Kuhnlein noted weakness in the left facial muscles, and numbness in the left lip from the lateral margin to midline. (Cl. Ex. 1, p. 19) Neurologic examination revealed decreased or absent reflexes in both the upper and lower extremities. (Cl. Ex. 1, p. 20) Sensation was also decreased in both upper and lower extremities. Musculoskeletal examination showed some stiffness with cervical range of motion. Dr. Kuhnlein also noted a fine tremor in both hands, and cogwheeling present with motor strength testing. (Cl. Ex. 1, p. 21) Claimant was noted to move about the room with a "broad-based gait," with his left foot externally rotated. He was unsteady on his toes and complained of tight hamstrings when squatting.

Dr. Kuhnlein's diagnosis was probable adverse reaction to Johnson and Johnson COVID vaccine, including Bell's palsy and Guillain-Barre syndrome (AIDP, CIDP). (Cl. Ex. 1, p. 22) Given the temporal relationship between the vaccine administration and claimant's symptom development, he felt it was more likely that not that claimant's conditions were related to the vaccine. Dr. Kuhnlein stated he would defer to Dr. Rogers with respect to MMI, but stated that based on what is currently known, it did not appear claimant had reached MMI at that time. (Cl. Ex. 1, p. 23) Despite that, Dr. Kuhnlein provided an impairment rating for "administrative purposes." He provided a 2 percent rating for the residuals from Bell's palsy; 5 percent for the residual gait issues from the GBS; and 2 percent for the residual left upper extremity weakness from the GBS. This resulted in a total combined rating of 9 percent of the whole person.

With respect to restrictions, Dr. Kuhnlein noted that a functional capacity evaluation (FCE) may be advisable. However, he recommended no lifting more than 20 pounds occasionally from floor to waist, 30 pounds occasionally from waist to shoulder, and 20 pounds occasionally over the shoulder. He further recommended sitting, standing, or walking on an “as tolerated” basis, with the ability to change positions for comfort. He felt claimant could occasionally bend, stoop, squat, crawl, or kneel, and occasionally climb stairs and work at or above shoulder height. He also recommended good footwear if working on uneven surfaces. (Cl. Ex. 1, p. 23)

Claimant testified that he was awarded Social Security Disability in November of 2021. (Tr., p. 52) At the time of hearing, he was employed with two small towns doing water readings and paperwork. He explained that he works for the City of Martelle, which consists of going in every day to check chlorine levels through the autometer, which takes about 30 minutes each day. (Tr., pp. 52-53) He does the same thing for the City of Morley, which he said takes about 15 minutes. (Tr., p. 53) However he only does the job for Morley one day per week. (Tr., p. 73) He testified that if chemicals need to be added, either his wife or another person will help him with lifting things or doing what needs to be done. (Tr., p. 73) He also applied for a position with Xenia Rural Water District, but did not get the job after he disclosed his physical condition and limitations. (Tr., p. 55; Cl. Ex. 4, p. 61)

At the time of hearing, claimant testified he continues to experience tremors in his hands and neuropathy from the fingertips to his wrists, making it difficult to grasp things at times. (Tr., p. 36) He testified that sometimes his fingers lock up, and compared the sensation to a muscle spasm in the leg. He testified that he still has pain in his neck region, from his shoulder blade up the left side of his neck. He still has some pain in his tailbone area, and he continues to wear braces (AFOs) on his lower legs. (Tr., pp. 36-37) He noted one brace is a fixed brace and one is a stabilizer. (Tr., p. 37) He continues to have “major neuropathy” in the left side of his leg, which he described as feeling like “pins and needles stabbing you in the skin, and then sometimes you get it where like something is getting ripped apart, especially in the foot.” He also said at times it is hard to tell the difference between hot and cold in his hands.

Claimant demonstrated his gait at the time of hearing, and noted he is unable to jump and has difficulties squatting. (Tr., pp. 38-39) He also testified that his calf muscles have atrophied a great deal, with the left being worse than the right. (Tr., p. 39) He still has difficulty getting into a shower or bathtub due to the sensitivity on the bottom of his feet and the drop foot. (Tr., pp. 40-41) He also has difficulty with stairs and prefers to use handrails on both sides if he must use stairs. (Tr., p. 41) He testified he can usually stand for about an hour at a time, and sitting is more difficult because of his tailbone. (Tr., p. 42) He has trouble walking on uneven ground, and with stair and ladders. (Tr., p. 55)

He continues with the IVIG treatments once per month, and has medications as well. (Tr., pp. 45-46) He continues to see Dr. Powell for his nerve pain as well. (Tr., p. 47) With respect to his former position with the City, he testified that he could still do some of the office work, if he could work around the tremors and pain, but it would be a struggle. (Tr., pp. 76-77) He testified at his deposition that he did not intend to look for additional work, because the work he does for Morley and Martelle is all he can handle. (Cl. Ex. 2, p. 44; Depo Tr., p. 44) However, he wants to go back to full-time work if he is able. (Cl. Ex. 2, p. 45; Depo Tr., p.45)

I find that based on the medical records and other evidence in the file, including claimant's credible testimony, he is not capable of returning to substantially similar employment at this time. He has not been placed at MMI, and there is no argument that claimant's termination from employment amounted to a refusal to accept suitable work under Iowa Code section 85.33(3). The work he does for the Cities of Morley and Martelle is very limited, and is not substantially similar to the work he was doing for the City of Cedar Rapids. As such, I find claimant is entitled to temporary total disability benefits beginning the date of his termination from employment, May 19, 2021, and continuing until such time as there is a basis for ending TTD benefits by law.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996).

The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (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 at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. 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 at 150. An employee does not cease to be in the course of employment merely because the employee is not actually engaged in doing some specifically prescribed task, if, in the course of employment, the employee does some act which he or she deems necessary for the benefit or interest of the employer. United Parcel Serv. v. Miller, No. 99-1596, 2000 WL 1421800, at *1 (Iowa Ct. App. Sept. 27, 2000)

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

This case appears to present an issue of first impression in Iowa. The first question presented is whether an adverse reaction to a vaccination that was not mandated by the employer can arise out of and in the course of employment. When considering issues of first impression in workers' compensation law, the Commissioner and Courts often look to Arthur Larson's treatise on workers' compensation law for guidance. With respect to inoculations and vaccines, Larson's treatise first notes that when inoculation is occasioned by the particular conditions of employment, or there is an element of actual compulsion emanating from the employer, the work connection is beyond question. 3 Larson's Workers' Compensation Law § 27.03[2] (2022) The treatise goes on to state:

When the inoculation is not thus strongly tied to the employment either by employer compulsion or by the special risks of the assignment, it may still be covered if there is a combination of strong urging by the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations.

Id. The Iowa Supreme Court has stated repeatedly that while workers' compensation is not intended as insurance for employees, it is for the benefit of workers and the law should, within reason, be liberally construed. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W. 2d 660, 662 (1961) This liberal construction applies to the law but not the facts. Larson's reasoning regarding vaccines is compatible with the Iowa Supreme Court's view that workers' compensation law is to be liberally construed for the benefit of the injured worker. As such, it is appropriate to apply it here, and look to other jurisdictions where it has been applied for guidance.

There is no dispute between the parties in this matter that the City did not mandate that employees get vaccinated. (See Tr., pp. 13-14; 58; 90) The parties also agree that the City "encouraged" employees to get vaccinated. The question is whether the City's encouragement rises to the level of "strong urging" such that it might "induce an employee to submit to treatment who might not otherwise have done so." Smith v. Brown Paper Mill, 152 So. 700, 704 (La. Ct. App. 1934). In Smith, the employer obtained a supply of typhoid serum and offered the shots to its employees after area waters were polluted due to flooding. Id. at 701. The court determined that the employees were not ordered or required to take the shots, but the employer posted a notice indicating the shots were available in the company first aid room. Id. at 703. The court held that the convenience of the facility and posted notice "constituted a suggestion, an invitation and urge, calculated to induce an employee to submit to the treatment who might not otherwise have done so." Id. at 704. The court also held that the employer received a direct benefit from having its workers inoculated, as its insurance rates were reduced and lost time from work by employees was minimized. Id. at 703. Therefore, the employee's adverse reaction related to the shot was compensable as a work injury. Id. at 704.

In Saintsing v. Steinbach Co., 64 A.2d 99 (N.J. Super. Ct. App. Div. 1949), the employer offered free smallpox inoculations “for all who choose to be immunized against smallpox.” Id. at 99. The notice distributed to employees also stated that “everyone is aware of the current spread of smallpox and we strongly urge that you take advantage of this service, which we are glad to provide in the interest of your health.” Id. The employer’s personnel director testified that it was his responsibility to “improve the employer employee relationship, to promote morale and create a happier environment for the employees.” Id. The personnel director also acknowledged that absenteeism disrupts orderly business, and it was in the employer’s interest that measures be taken to reduce absences. Id. The court found that the vaccination service, in this case furnished on the employer’s premises, was a “mutually beneficial facility comparable to its medical clinic, cafeteria, and other employee facilities incidental to the employment.” Id. at 101. Insofar as it aided in the prevention of smallpox among the employees, it benefited the employer’s business both by reducing absenteeism and improving the employer’s relationship with employees. Id. The court also held that while not compelled, the employees were “strongly urged to submit to the vaccination, and in natural response, most of them did.” Id. As such, the claimant’s adverse reaction to the vaccine was deemed compensable. Id.

In Monette v. Manatee Memorial Hospital, 579 So.2d 195 (Fla. Dist. Ct. App. 1991), an employee suffered an adverse reaction to a flu shot received at work. The health services manager at the hospital testified that the flu vaccination program was offered every year because the Advisory Council for Immunization Practices recommended the flu vaccine for high-risk individuals. Id. at 196. The vaccine was offered to employees for free since many were on limited incomes. While the manager denied that the purpose of the program was to reduce employee absenteeism, she admitted reduced absenteeism was a benefit to the employer. The court held that an employer clearly derives a benefit from maintaining the health of employees, in much the same fashion as an employer is benefited by improved employee morale under the personal comfort doctrine. Id. at 197. The court also noted that because the claimant in this case was a high-risk individual working in a hospital setting, and the National Advisory Counsel recommended flu vaccinations for such individuals, the claimant “recognized her responsibility to protect patients from exposure to flu, and availed herself of the opportunity to avoid contracting the flu.” Id. The injury was again deemed compensable.

More recently, in E.I. DuPont De Nemours & Co. v. Faupel, 859 A.2d 1042 (Del. Super. Ct. 2004), an employee suffered an adverse reaction to a flu vaccination, including GBS and CIDP. Id. at 1044. The claimant in Faupel had previously suffered a reaction to a swine flu vaccine in 1976, and had not received any additional flu shots between 1977 and 2001. Id. at 1045. However, after receiving a promotion in 2000, she decided to receive the flu vaccine in October 2001 because she “needed to be ‘on the job’ for her boss.” Id. She also

said that her family doctor had recommended a vaccine due to her age and because she was caring for elderly parents. Id.

The claimant in Faupel received the vaccination at DuPont's in-house medical health department, which offered flu vaccines every year to any employee who wished to receive one. Id. There was no incentive for employees or requirement that they receive a vaccine. Rather, the program was provided "as a convenience to employees." Id. Employees were informed about the vaccination program through flyers and bulk email messages. There were posters hung throughout the offices, and emails and flyers encouraged employees to get the shot "while supplies last." Id.

The flu shot was administered during work hours, in the DuPont building, by a registered nurse who was a DuPont employee. Id. at 1046. That nurse testified that the vaccination was a preventative measure, and that it could reduce employee absenteeism, as employees can be out of work for up to two weeks if they get the flu. The nurse also testified the vaccine was offered by the employer to promote good employee relations. Id.

The court used Larson's test in analyzing the facts of the case. Id. at 1050. The court noted that the vaccine program was only offered to employees, and funded by DuPont, and administered on-site by a DuPont employee. Id. at 1048; 1052. The court noted, however, that a compensable injury does not have to take place during job-related activity, and may be incidental to employment. Id. at 1052. Therefore, even if an employee is injured during an activity that results from a facility or act of the employer provided for the convenience of the employee, the injury may be compensable. Id.

The court also found that DuPont had sufficiently encouraged employees to receive the vaccination such that it rose to the level of "strong urging," due to the frequency of the reminders, the placement of flyers around the office, and the fact that emails were sent directly to employees. Id. at 1053. Essentially, the court held it was not necessarily the wording of the flyers and emails that constituted "strong urging," but the quantity of the notices that was determinative. Id.

Finally, the court found that the vaccination provided a mutual benefit to the employer and employee. Id. The court agreed with the Saintsing court that it would be "unrealistic to find that [the vaccinations] were for the exclusive benefit of the employees." Id. The court noted that there are "intangible benefits" of good employer-employee relations that accrued from DuPont providing the vaccination. Id. at 1048-1049; 1053. Further, the court held that DuPont clearly had a practical interest in avoiding absenteeism, and providing the vaccination could diminish the spread of illness among employees. Id. at 1049; 1053. The court also addressed the argument that the federal government was the entity promoting and publicizing the program, and that a holding of compensability

would have a chilling effect on employers promoting future vaccination programs recommended by the federal government. Id. at 1049; 1054. The court dismissed those arguments, and refused to speculate about the applicability of the law to factual scenarios not before the court. Id. at 1054. Ultimately, the court found the claimant's injury compensable.

Finally, in Case of Hicks, 820 N.E.2d 826 (Mass. App. Ct. 2005), an employee of Boston Medical Center had an adverse reaction to a flu vaccine she received over her lunch hour on the employer's premises. Id. at 828. The court used Larson's test in analyzing the case, and found the employee's injury compensable. The court also noted Larson's criticism of cases in which the courts "appear to assume that the employment must be the sole cause of the test or inoculation." Id. at 836, FN 7 (citing 2 Larson's Workers' Compensation § 27.03[2] at 27-32 (2001)). Indeed, Larson notes that some cases have held that an inoculation or test is not in the course of employment "if the compulsion comes from states law or public authority. . ." Id. Larson criticizes those cases, and notes that it would be more correct to say that "the employment need only be a concurring cause." Id.

In other words, if an employee receives an inoculation or test both because employment requires it and because the states requires it for the employee to hold that job, the employment is a concurrent cause. Id. In this case, the same could be said for the fact that the CDC and other state and federal agencies were recommending COVID-19 vaccines. The fact that those government entities were also "strongly urging" the vaccine does not make the employer's urging irrelevant. Furthermore, the employer chose to promote the vaccine, and chose to provide the Unity Point link for vaccine registration to all City employees. In addition, providing a link solely for City employee use to register for a vaccine at a time when supply was limited and appointments were scarce made it more convenient for employees to get vaccinated. The frequency of vaccine reminders and updates, as well as the language used in many of those updates, constitute strong urging on behalf of the employer, regardless of what other entities shared the same message.

Given the frequency with which the employer in this case urged all employees to get a COVID-19 vaccine, and the language used in those emails and newsletters, I found that the City "strongly urged" employees to get vaccinated. Additionally, I found the vaccine provided a mutual benefit to both the employer and employee. Reduced absenteeism is in the best interest of any employer, and it is clear from emails in evidence that the City was experiencing employee absenteeism on a regular basis during the COVID pandemic. Finally, there were additional benefits to employee relations and morale when considering the COVID-19 vaccine. The City often noted its desire to see the pandemic end for the health and safety of its employees, along with desires to protect others in the community, feel safe at work, and "be able to shake hands with your coworkers." (Def. Ex. C, p. 30) When it comes to claimant specifically,

he testified that he felt a little bit of peer pressure, but also felt he owed it to his department to get vaccinated. (Tr., p. 68) He felt it was “the proper thing to do” as a manager and an essential worker, and did not want his employees to get sick. (Cl. Ex. 2, p. 39; Depo. Tr., p. 22)

In addition, the fact that claimant’s COVID-19 vaccine was not administered on City property or by a City employee does not remove it from the course of employment. Iowa courts have also adopted Professor Larson’s test for determining when a social or recreational activity arises out of and in the course of employment. See Briar Cliff College v. Campolo, 360 N.W.2d 91 (Iowa 1984) (citing 1A Larson’s Workers’ Compensation §22.00, at 5-71 (1982)). In cases involving social or recreational activities, the fact that the injury occurs off the employer’s premises is not determinative. Rather, the question relates to the employer-derived benefit of the activity, “beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. Id. at 94. While this case does not involve social or recreational activities, the case law involving such instances supports the notion that the physical location of the vaccine is not the only factor to consider in finding the injury compensable.

Based on all of the evidence in the record, I find that the City strongly urged all City employees to receive a COVID-19 vaccination. In addition, there were mutual benefits between the employer and employees, including lessened absenteeism and improved employee relations. As such, I find that claimant’s injury arose out of and in the course of his employment with defendant employer.

Because claimant’s injury arose out of and in the course of employment, defendant is responsible for all medical expenses and mileage incurred in claimant’s treatment. (See Cl. Ex. 11, 12) Under Iowa law, once the City denied compensability for claimant’s alleged injuries, it lost the right to choose the medical providers for that care during the period of denial. “[T]he employer has no right to choose the medical care when compensability is contested.” Bell Bros., 779 N.W.2d at 204. Further, when compensability is contested, “the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.” R. R. Donnelly & Sons v. Barnett, 670 N.W.2d at 197-198 (Iowa 2003). As such, defendants are responsible for all medical care claimant has received related to the work injury.

Claimant has submitted a summary of medical expenses for which he seeks reimbursement. (Cl. Ex. 11) Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the

claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) (“We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.”) See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

The parties have stipulated that in the event of an award of benefits, defendant will reimburse claimant for his out-of-pocket and deductible payments for causally related medical expenses, which the parties agree is \$5,000.00 for 2021 and 2022. (See Def. Brief, p. 2; Cl. Brief, p. 1) The parties have also stipulated that defendant shall receive a credit under section 85.38(2) for all medical payments made to health care providers on claimant’s behalf by its group health plan.

Claimant alleged the issue of alternate medical care on the hearing report, but neither party argued the issue in their brief. Given that the injury is compensable, claimant is entitled to ongoing reasonable and causally related medical care for the work injury, pursuant to Iowa Code section 85.27.

The next issue to determine is whether claimant is entitled to a running award of temporary benefits. Both Iowa Code section 85.33(1) and section 85.34(1) provide that temporary benefits, whether temporary total disability (TTD) or healing period (HP), are to be paid until the employee has returned to work, has reached MMI, or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first. The difference between TTD benefits and HP benefits is whether the injured employee ultimately sustains a permanent disability from the work injury. In the current case, the issue of permanency is not presently ripe for determination. Consequently, this decision will consider the question of whether claimant is entitled to TTD benefits, with the understanding that these benefits may be reclassified as HP benefits in the future if claimant is found to have sustained a permanent disability from the work injury.

I found that based on the medical records and other evidence in the file, including claimant’s credible testimony, he is not capable of returning to substantially similar employment at this time. He has not been placed at MMI, and there is no argument that his termination from employment amounted to a refusal to accept suitable work under Iowa Code section 85.33(3). The work he performs for the Cities of Morley and Martelle is very limited, and is not substantially similar to the full-time position he held with the City of Cedar Rapids. As such, I find claimant is entitled to temporary total disability benefits beginning the date of his termination from employment, May 19, 2021, and continuing until such time as there is a basis for ending such benefits by law.

The parties stipulated that in the event of an award of benefits, claimant’s accrued temporary benefits would be reduced by claimant’s net earnings in 2022, in the amount of \$8,850.00.

The next issue to determine is whether claimant is entitled to penalty benefits based on an unreasonable denial. Iowa Code section 86.13 governs compensation payments, including 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." Robbenolt 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). 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.

Pursuant to Iowa Code section 86.13(4)(c), the employer bears the burden to establish that the reasonable cause or excuse for the delay in benefits was preceded by a reasonable investigation, that the results of that investigation are the actual basis for denial, and that the employer contemporaneously conveyed the basis to the claimant at the time of the delay or denial. When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Defendant argues that compensability of this case has been fairly debatable from the outset, as it involves an issue of first impression for which there is no clear authoritative guidance bearing on compensability. (Def. Brief, p. 13). I agree. While there is case law regarding social and recreational activities that may be viewed as guidance, those cases are not determinative in this situation, as this case involves

vaccination. While Larson's treatise provides guidance, defendant had a reasonable basis to believe no benefits would be owed to claimant. No Iowa court has interpreted the section of Larson's treatise involving inoculations. The factual disputes in this case, including whether the City "strongly urged" employees to get a COVID vaccine, would have supported the employer's denial of compensability if resolved in favor of the employer. As such, penalty benefits are not appropriate in this case.

The final issues to determine are whether claimant is entitled to reimbursement of his IME with Dr. Kuhnlein under Iowa Code section 85.39, and taxation of costs. Iowa Code section 85.39(2) states, in relevant part:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the 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 choice, and reasonably necessary transportation expenses incurred for the examination.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39). This includes an employer-chosen physician's opinion that there was no causation, as such an opinion is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W. 2d. 326 (Iowa Ct. App., 2021).

In this case, claimant proceeded with an IME performed by Dr. Kuhnlein before any evaluation of permanent disability or causation opinion had been provided by an employer-retained physician. Claimant has failed to establish entitlement to reimbursement of his IME with Dr. Kuhnlein under Iowa Code section 85.39. DART at 844 ("An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process.")

That being said, the Supreme Court in DART noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the

written report as a cost under rule 876 IAC 4.33. DART, 867 N.W.2d at 846-847. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Dr. Kuhnlein provided an itemized bill for his IME, which shows \$5,084.00 of his total fee is related to preparing the written report. (Cl. Ex. 1, p. 27) As such, I find that the cost of the report is reimbursable pursuant to 876 IAC 4.33. With respect to the remainder of claimant's requested costs, I find that claimant was generally successful in his claim, and an award of additional costs is appropriate. I exercise my discretion and award claimant the cost of the filing fee in the amount of \$103.00, and deposition transcript in the amount of \$89.25. (Cl. Ex. 13, p. 151)

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant temporary total disability benefits, commencing May 19, 2021, at the stipulated rate of one thousand one hundred twenty-seven and 31/100 dollars (\$1,127.31). Said benefits shall continue until such time as there is a basis for ending such benefits by law.

Defendant shall be entitled to a credit against accrued benefits pursuant to the stipulations of the parties.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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).

Defendant shall reimburse claimant for out-of-pocket expenses associated with medical treatment for his work injury, pursuant to the stipulations of the parties and as outlined above.

Defendant is responsible for all reasonable and causally connected medical expenses and medical mileage related to claimant's work injury, including future medical expenses and mileage pursuant to Iowa Code section 85.27.

Defendant shall reimburse claimant's costs in the amount of five thousand two hundred seventy-six and 25/100 dollars (\$5,276.25), as outlined above.

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 19th day of June, 2023.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas D. Wolle (via WCES)

Jason Wiltfang (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.