BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE PHILLIPS, Claimant, vs. KIMBERLEY FARMS, INC., Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED APR 24 2019 WORKERS' COMPENSATION	File No. 5057945 ARBITRATION DECISION Headnotes: 1402.40, 2206, 2501, 2907

STATEMENT OF THE CASE

Dale Phillips, claimant, filed a petition for arbitration against Kimberley Farms, Inc., as the employer, and Farm Bureau Property & Casualty Insurance Company, as the insurance carrier. The undersigned heard this case on January 29, 2019 in Des Moines.

The parties filed a hearing report at 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 bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 17, Claimant's Exhibits 1 through 14, and Employer's Exhibits A through F. All exhibits were received without objection.

Claimant testified on his own behalf and defendants called Jack Marten to testify. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. Due to counsel's scheduling issues, they requested an extended briefing schedule. Ultimately, the parties filed post-hearing briefs on April 15, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the December 22, 2014 work injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

2. Whether the December 22, 2014 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any.

3. Claimant's average gross weekly earnings immediately prior to the date of injury and the applicable weekly rate at which any benefits should be paid.

4. Whether claimant is entitled to payment of past medical expenses itemized at Claimant's Exhibit 9.

5. Whether claimant is entitled to reimbursement of his independent medical evaluation fees.

6. Whether defendants should be ordered to pay penalty benefits for unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

7. Whether costs should be assessed against any party and, if so, the extent of reimbursement that should be ordered.

FINDINGS OF FACT

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

Dale Phillips, claimant, is a 62-year-old man. Mr. Phillips resides in Fort Dodge, Iowa. (Transcript, pages 12-13) He sustained an admitted work injury at Kimberley Farms, Inc. on December 22, 2014. (Hearing Report) Claimant was hired by Kimberley Farms to drive a grain cart and semi to transport harvested grain within the State of Iowa in the fall of 2014. (Tr., pp. 21, 23, 26)

On December 22, 2014, Mr. Phillips was doing post-harvest work for the employer and cleaning pieces of farm equipment with a high-pressure hose. At the time of his injury, he was on top of a field disc, working essentially in a farm area near the home where he resided. (Tr., p. 32) He slipped, fell, and wedged his body between two discs. He testified that his torso, or pelvis, and right leg were wedged into the gap and his left leg was forced into a perpendicular, or horizontal, position. He required assistance of a co-worker to extricate himself. (Tr., p. 30) Mr. Phillips testified that the pain he experienced at the time of the fall was "pretty bad" and he had to lay down for an hour and a half. (Tr., p. 32)

Claimant returned to work the same day as the injury. He testified that he experienced excruciating pain upon returning to work on December 22, 2014. (Tr., p. 33) He also testified that his symptoms included his entire spine from his neck all the way to his tailbone and his pelvis with symptoms greater toward the right side of his back. (Tr., pp. 33-34)

Mr. Phillips alleges he sustained injuries to his neck, low back and left shoulder as a result of the December 22, 2014 work injury. He has a long-standing history of injury and chronic pain in both his neck and low back. In 1998, claimant was injured when a scaffolding collapsed and he fell. At that time, he sustained a fractured right pelvis. (Tr., pp. 15, 59) Medical records confirm the fractured pelvis and note that claimant "had persistent chronic low back pain and had a lumbar laminectomy and fusion" including the L4-5 and L5-S1 levels. (Joint Exhibit 14, p. 149)

Claimant admitted to both the referenced lumbar fusion as well as a cervical fusion prior to the December 22, 2014 work injury. He had ongoing medical treatment for chronic pain. (Joint Ex. 14, p. 149) In 2001, claimant was documented as having to use a cane 50 percent of the time due to low back injuries causing a stiff left leg and gait alteration. (Joint Ex. 2, p. 30) That same medical record documents that claimant is disabled and could not work because of the scaffold incident. (Joint Ex. 2, p. 30) Claimant conceded at hearing that he has been on Social Security disability since approximately 1995. (Tr., pp. 76-77; Joint Ex. 13, p. 140)

Recent medical records document ongoing chronic back pain. In 2010, medical records document that claimant was involved in a motor vehicle accident, injuring his low back and neck. (Joint Ex. 1, p. 4)

In 2011, Mr. Phillips was involved in an altercation with Fort Dodge police officers. (Tr., pp. 85-86; Joint Ex. 2, p. 36; Defendants' Ex. C, p. 40) Claimant testified he was thrown to the ground and an officer placed his knee in claimant's back causing injury. Mr. Phillips filed suit against the Fort Dodge police department, alleging they caused him physical injury to his neck and low back. (Tr., pp. 86-88)

In 2011, claimant submitted to implantation of a pain pump. He required long-term use of opioids and was requesting increases in his opioid medications. (Joint Ex. 43, pp. 52, 54, 58) Yet, in November 2012, claimant refused a urine drug screening that was requested by his physician pursuant to a narcotic drug contract. (Joint Ex. 4, p. 61)

In January 2013, claimant still had his morphine pain pump in place. He complained of back and leg pain and expressed difficulty with walking. He described radiating pain into both thighs, numbness in his feet, and stumbling when he walked. (Joint Ex. 5, p. 72) In April 2013, claimant reported back pain and left leg pain at the level of 9 out of 10 on a 10-point pain scale. (Joint Ex. 2, p. 30)

In July 2013, claimant refused a urine drug screening. (Joint Ex. 4, p. 63) In September 2013, claimant submitted to and failed a urine drug screening, which disclosed the presence of methamphetamines in claimant's system. (Joint Ex. 6, p. 79)

Claimant denies using methamphetamines during his testimony and described this as a false positive test. (Tr., pp. 104-105, 107)

Medical records close in time, but prior to, the December 22, 2014 work injury demonstrate significant ongoing symptoms in claimant's neck and low back. For example, on January 23, 2013, claimant reported back and leg pain. Mr. Phillips reported radiating pain into both thighs, numbness in his feet, difficulties lifting his right foot, and stumbling while walking. He also reported that it was difficult to walk due to his symptoms. (Joint Ex. 5, p. 72) On April 15, 2013, claimant reported 9 out of 10 back pain with left leg pain. (Joint Ex. 2, p. 35) On August 14, 2014, claimant reported neck and low back pain with the back pain reported as having existed for 15 years. (Joint Ex. 9, p. 107) On August 1, 2014, claimant was reported to have a pain pump implanted and was reported to have been on opioid medication for more than 10 years. (Joint Ex. 9, p. 108) Claimant reported 9 out of 10 low back pain on September 17, 2014. (Joint Ex. 10, p. 11) On October 2, 2014, claimant reported severe constant burning in his low back. (Joint Ex. 10, p. 114)

In support of his claim against the Fort Dodge Police Department, Mr. Phillips retained Jacqueline M. Stoken, D.O., to perform an independent medical evaluation. Dr. Stoken evaluated claimant on January 22, 2015. She opined that claimant's neck and low back symptoms as of January 22, 2015 were not related to the altercation with the police. Instead, Dr. Stoken opined that claimant had chronic neck and back pain and that any increase in symptoms resulting from the police altercation had resolved back to baseline. (Defendants' Ex. C, pp. 53-55)

Interestingly, although Dr. Stoken evaluated claimant approximately one month after the accident at Kimberley Farms, Mr. Phillips did not disclose that accident or any injuries resulting from it to Dr. Stoken during her interview and evaluation in January 2015. (Tr., pp. 92-94) Claimant asserted during his testimony at trial that he did not disclose the fall at Kimberley Farms or any resulting symptoms to Dr. Stoken in January 2015 because "maybe they hadn't developed yet." (Tr., p. 94)

Claimant's testimony is not credible. He testified that he experienced immediate symptoms after the fall in December 2014. He testified that he had excruciating symptoms upon returning to work on the date of injury. Yet, when questioned about his failure to disclose these symptoms and injuries to Dr. Stoken, claimant testified that the symptoms had not yet developed. (Tr., p. 94)

In fact, when asked about his neck and back, claimant reported 8-9 out of 10 pain on a 10-point pain scale to Dr. Stoken in January 2015. (Defendants' Ex. C, p. 51) He reported similar pain levels at the time of trial. (Tr., p. 145) Yet, claimant testified that his symptoms had not started at the time he was evaluated by Dr. Stoken. (Tr., p. 94) Mr. Phillips also testified that his symptoms have worsened since his evaluation with Dr. Stoken. (Tr., p. 145) Medical documentation by Dr. Stoken and the pain clinic on the same date suggest he had significant pain symptoms prior to the December 2014 injury and prior to Dr. Stoken's January 2015 evaluation. Again, claimant's testimony and explanation are not credible.

Claimant's testimony in this regard was hard to accept at the time of trial. Therefore, the undersigned engaged in some interrogation of claimant and gave him an opportunity to explain this testimony. Specifically, on page 144 of the transcript, the undersigned inquired of claimant, "I am trying to figure out why you didn't tell Dr. Stoken when you went to visit her about the injury that happened at Kimberley Farms."

Claimant responded:

> Because I was trying to keep them separate.
>
> Because when I got rear-ended at a stoplight, my attorney, Harley Erbe, and another injury, with the Fort Dodge PD, I was trying to – I kept them separated by date of occurrence, because there was more –
>
> A lot of injuries from the accident would have – if you go by date of the accident, you can't put everything from one to the – even if it's –
>
> Are you following what I'm trying to say?
>
> You know, by datewise, calendarwise, if you get in a wreck on June 6th of 2011 or 2012, whatever it was, and then an exact year later I get thrown around by the Fort Dodge cops, and I just finish treating and going through a year of therapy and all this and that, and then this other thing happened, and then the attorney would get upset because you're taking all this and this and putting it over there. I'm just going by the date of occurrence.
>
> Does that make any sense?
>
> Because I didn't have these injuries before then. It happened, you know, the – I mean, you don't tear a - - Well, at least to me, didn't tear a shoulder muscle. Again, I was rear-ended and got whiplash in my back, because— you know, because of the – because the muscle is torn over here, you know, and it's just – You know what I'm saying? If you go – whiplash your neck straight back, usually it doesn't have anything to do with your shoulder.
>
> It didn't to me anyway.

(Tr., pp. 144-145)

Obviously, this is a rambling and mostly non-responsive answer to my question. Frankly, I believe claimant's first sentence in response to my inquiry is the accurate answer. Mr. Phillips was trying to keep the incidents separate and pin all his symptoms in January 2015 upon the police altercation and still be able to claim later that his symptoms were related to the injury at Kimberley Farms in December 2014.

I do not ascribe any legitimate, proper purpose or motives to claimant's efforts to conceal the Kimberley Farms fall from Dr. Stoken. In fact, claimant never revealed the

fall or any medical records allegedly pertaining to the December 2014 fall to Dr. Stoken. Worse yet, claimant was evaluated the same date as Dr. Stoken's evaluation at a pain clinic. Claimant did not report his fall or resulting symptoms at Kimberley Farms to the pain clinic on that date. (Joint Ex. 10, p. 118)

Mr. Phillips was treating with the pain clinic before the December 2014 fall. In October 2014, Mr. Phillips reported severe and constant burning pain in his low back. He reported 8 to 9 out of 10 pain levels for the several days preceding his evaluation. At the October 2014 appointment, claimant reported he had experienced chronic pain since July 2011, and that he experienced continuous pain. He also reported increases in symptoms with standing, walking, bending over, and any type of movement, in spite of working for Kimberley Farms during that fall's harvest. (Joint Ex. 10, p. 116)

Mr. Phillips returned to the pain clinic on January 22, 2015, the same date as Dr. Stoken's evaluation. If claimant sustained a new and significant injury in December 2014, which caused a significant increase in his symptoms, he likely would want his treating pain clinic to know about the intervening injury to ensure he received necessary medical care. Instead, on January 22, 2015, claimant reported to the pain clinic that he had pain at 8 out of 10. He also indicated that pain medications and laying down were the only thing that helped his pain. He also told the pain clinic that he had "been dealing with this pain since 2011." (Joint Ex. 10, p. 118) Mr. Phillips' testimony that his symptoms had not yet begun after the December 2014 fall or that they worsened after January 22, 2015 is not credible.

Interestingly, in spite of testifying that he does not ever recall taking methamphetamines, Mr. Phillips again tested positive for methamphetamines in January 2015 and April 2018. (Joint Ex. 10, p. 120; Joint Ex. 16, p. 165) His pain clinic discharged him as a patient for violating his drug contract as a result of the positive test in January 2015. (Joint Ex. 10, p. 121) Then, the pain clinic documented that claimant called on February 25, 2015, using vulgar language and threatening staff at the clinic. (Joint Ex. 10, p. 123) Claimant denied this at trial. (Tr., pp. 107-109)

Claimant's testimony is not credible in this regard. Refusing drug tests makes me suspicious claimant was using illegal drugs. Failing multiple drug tests and being released as a patient because of those failed drug tests convincingly suggests claimant was using methamphetamines. His denial of any use of methamphetamines is simply not credible.

Claimant offered a similar denial with respect to a criminal charge of operating while intoxicated. Claimant apparently lost his driving privileges for an OWI conviction. At trial, claimant denied that he was ever arrested for OWI or that he was the driver that was stopped by the police. Instead, he blamed it on a roommate and called it a "fake traffic stop." (Tr., pp. 122, 137-138) Again, claimant's refusal to take responsibility simply lacks credibility and hurts claimant's overall credibility.

Claimant offered additional troubling testimony in which he accused the employer of installing Spyware on his personal phone so it could track him. Claimant offered no

evidence that such Spyware had been found on his phone by a professional. (Tr., p. 115) He offered no explanation or motivation why the employer would do this. None of claimant's testimony in this regard was credible or convincing.

Mr. Phillips also offered testimony that he believes he has a computer chip surgically implanted in his cervical spine. He believes the chip was implanted when he submitted to a cervical fusion. (Defendants' Ex. F (Claimant's deposition, pp. 46-54)) That cervical fusion occurred before claimant began working for Kimberley Farms. Yet, he somehow still attributes the implantation of that computer chip into his spine as possibly being directed by Kimberley Farms. (Tr., pp. 116-119; Joint Ex. 11, p. 126) He offers no explanation how Kimberley Farms would know he would later apply for employment with them or why they would want to implant the computer chip into his body.

Mr. Phillips also testified that he believes the computer chip may be the work of the Chinese government. He testified that the Chinese leader toured the Kimberley Farms and that perhaps their security personnel would have implanted the chip to monitor any danger. (Tr., p. 118) Again, how the Chinese government would predict and know that Mr. Phillips would later apply for work at Kimberley Farms is unexplained.

At any rate, claimant believes that whomever implanted the computer chip into his body is able to see and hear what he sees and hears. None of the MRIs or radiographic examinations of claimant's spine since his cervical fusion have demonstrated evidence of some computer chip being implanted into his body.

Claimant's assertion regarding implantation of a computer chip in his cervical spine requires a conspiracy that includes participation by the neurosurgeon that did his cervical fusion, all nurses and technicians in the operating room during his cervical fusion, all radiologists reviewing radiographs of claimant's spine since the date of the fusion, two physicians retained by claimant for litigation purposes, David J. Boarini, M.D., any other physicians that have reviewed claimant's radiographs, Kimberley Farms personnel, and potentially the Chinese government. Somehow, all of these individuals and entities must have similar, unexplained interests, and have worked in a coordinated fashion to cover up the implantation of a computer chip in claimant's body. No such conspiracy exists. No computer chip is implanted in claimant's body, and no one is attempting to control claimant through a computer chip in his body.

Mr. Phillips also testified that the Kimberleys (or someone else) were entering his home and bedroom while he was asleep, giving him illegal drugs, and that people were living in a semi on his farm place. (Tr., pp. 112-114) He perceived that people were shooting BBs at his vehicle windows. (Tr., p. 115) Claimant believes all of these actions were intimidation actions, though the purpose or goal of the intimidation is not well explained by claimant.

Defendants' witness, Jack Marten, testified that the Kimberley family would not do the types of things claimant alleges. Mr. Marten was forthcoming with admissions that were not beneficial to his employer. He presented as credible, and I accept his

testimony as accurate. I find that claimant believed these actions to be taken but, in reality, the employer was not entering claimant's home while he was asleep, was not involuntarily drugging him, and was not attempting to intimidate him. No one was living in a semi on claimant's home place. Claimant's testimony pertaining to these issues is not credible.

I recognize that it is possible that Mr. Phillips perceives the world different from reality. He may not be outright lying in much of his testimony. Some of the testimony likely is claimant's perceptions and beliefs. Yet, he is not offering credible testimony on these issues. Although he denied it at trial, Mr. Phillips has been diagnosed with delusional disorder. (Joint Ex. 11, p. 129) This diagnosis likely explains much of claimant's testimony. Mr. Phillips' testimony is found not credible.

Four physicians have offered opinions pertaining to claimant's current low back and neck symptoms. The first physician, Mohammad S. Iqbal, M.D., is a treating pain specialist. He was not specifically asked to opine on causation. However, in his November 21, 2017 office note, Dr. Iqbal pondered the issue of causation and indicated that claimant's condition was not a work-related injury. (Joint Ex. 14, p. 149) Dr. Iqbal likely did not have all of claimant's pre-existing medical records or a full history of the events upon which to base his opinion. For this reason, his opinion is not entirely convincing. On the other hand, Dr. Iqbal was not retained by either party and had no interest in the outcome of this litigation. For that reason, his opinion does carry some weight and must be considered in conjunction with other available evidence.

Dr. Boarini evaluated Mr. Phillips in July 2015. Dr. Boarini also evaluated claimant as a treating physician for purposes of rendering care to claimant, if needed. Dr. Boarini does note that the claimant was referred to him by the workers' compensation carrier for evaluation, however.

Dr. Boarini noted reports of bilateral hand numbness and tingling, bilateral hand weakness, constant headache, and mid to low back pain. Claimant reported to Dr. Boarini that he experienced sharp pains bilaterally into his toes, bilateral calf and thigh burning as well as bilateral numbness and tingling in his feet and leg weakness. Dr. Boarini was aware of claimant's prior surgical history, including both the cervical and lumbar fusions. (Joint Ex. 12, p. 131)

Dr. Boarini recorded the history from claimant that he was "working power washing farm equipment and fell landing between two blades." (Joint Ex. 12, p. 131) Dr. Boarini also noted that claimant was applying for worker's compensation benefits. It does not appear that Dr. Boarini was made aware of prior injuries such as the collapsed scaffolding or the police altercation. (Joint Ex. 12, p. 131)

Dr. Boarini notes that he reviewed prior x-rays and MRIs of claimant's cervical and lumbar spine. He performed a physical examination and issued a report to claimant's referring physician, Laine Dvorak, M.D. on July 1, 2015. Dr. Boarini noted "no neurological abnormality," a "normal gait, normal muscle tone, and normal strength in the upper extremities." (Joint Ex. 12, p. 132) Dr. Boarini did not identify any

structural abnormalities, other than prior fusions. He opined that claimant's imaging demonstrated "nothing new or related to an injury" and that claimant's lumbar spine film was also stable. (Joint Ex. 12, p. 132) His only recommendation was some physical therapy to move claimant back into normal activity. (Joint Ex. 12, p. 132)

Again, Dr. Boarini's view of the alleged injury is limited. He does not have the entire history before the injury date. However, Dr. Boarini was clearly aware of the alleged mechanism of injury. He was hired to provide neurosurgical recommendations, not as an expert witness. As a specialist and as a physician hired to provide medical recommendations and treatment, if necessary, Dr. Boarini's opinions carry some weight in this situation.

The third physician who has rendered causation opinions in this case is Dr. Stoken. As mentioned previously, Dr. Stoken was retained by claimant to provide an independent medical evaluation for his lawsuit against the Fort Dodge Police. Dr. Stoken rendered opinions at least partially adverse to claimant's interests in that lawsuit, which certainly bolsters her credibility.

Dr. Stoken's independent medical evaluation report details that she reviewed over 3,000 pages of prior medical records for claimant. She was clearly aware of claimant's prior medical history, including his scaffolding fall and the allegations of police brutality. Dr. Stoken was not aware of the alleged injury at Kimberley Farms approximately one month before her evaluation and I already found that claimant's motives in not disclosing that fall were not legitimate or proper.

Defendants provided Dr. Stoken with additional information and ultimately deposed Dr. Stoken. Dr. Stoken is the only physician that was deposed and provided a full explanation of her opinions. Dr. Stoken ultimately opined that claimant is not credible. For the reasons outlined above, I concur with Dr. Stoken that Mr. Phillips is not credible. (Defendants' Ex. F (deposition of Dr. Stoken, pp. 30-31))

Dr. Stoken confirmed that Mr. Phillips never provided her a history pertaining to the December 2014 fall at Kimberley Farms. (Defendants' Ex. F (deposition of Dr. Stoken, p. 30)) She documented in her report and clearly explained claimant's pre-existing and long-standing chronic pain resulting from cervical and lumbar injuries years before the December 2014 injury and even prior to the 2011 police altercation. (Defendants' Ex. D; Defendants' Ex. F (deposition of Dr. Stoken, pp. 26-27))

Dr. Stoken testified that claimant reported his symptoms on January 21, 2015, during her evaluation, were related to the police altercation in 2011 and made no reference to the December 2014 fall at Kimberley Farms. (Defendants' Ex. F (deposition of Dr. Stoken, pp. 11-15)) Dr. Stoken reviewed and confirmed that claimant was reporting significant pain levels, as high as 9 out of 10, months before the alleged December 22, 2014 injury at Kimberley Farms. During her evaluation, claimant did not report any left shoulder symptoms to Dr. Stoken. (Defendants' Ex. F (deposition of Dr. Stoken, p. 24)) I accept Dr. Stoken's statement in this regard and find that claimant did not have left shoulder symptoms at the time of Dr. Stoken's evaluation. Claimant did

not sustain a left shoulder injury as a result of his fall at Kimberley Farms in December 2014.

Dr. Stoken ultimately opined that claimant had some pre-existing, chronic neck and low back symptoms and that he had returned to the underlying baseline of those chronic symptoms by January 2015 when she evaluated Mr. Phillips. (Defendants' Ex. F (deposition of Dr. Stoken, pp. 61-62)) As a physician retained by claimant, who is providing opinions adverse to claimant, Dr. Stoken's opinions carry significant weight. She clearly has a grasp of claimant's medical history. Similar to my findings, she does not give credibility to claimant's statements. In this case, I find Dr. Stoken's opinions to be convincing and credible.

Finally, claimant retained Sunil Bansal, M.D. to perform an independent medical evaluation in this case. (Claimant's Ex. 1) Dr. Bansal evaluated Mr. Phillips on September 19, 2018. Following his record review and physical examination of claimant, Dr. Bansal opined that claimant's neck symptoms were caused by, or more accurately, were an aggravation of his underlying neck problems, as a result of the December 22, 2014 fall at Kimberly Farms. (Claimant's Ex. 1, p. 22)

Dr. Bansal's opinions pertaining to the low back are a bit more tenuous or confusing. At one point in his report, Dr. Bansal opines that the "phenomenon is essentially the same for the lumbar spine." (Claimant's Ex. 1, p. 22) This could be read to say that Dr. Bansal causally connects claimant's ongoing lumbar issues to the December 22, 2014 fall. However, when specifically offering an opinion on causation pertaining to the back, Dr. Bansal opines, "Insufficient medical evidence to attribute a work related etiology/aggravation to the December 12 or 22, 2014 injury." (Claimant's Ex. 1, p. 22) Dr. Bansal's report and opinions are contradictory, or at least confusing, with respect to causation of the low back symptoms.

During his evaluation, Dr. Bansal took a history from claimant that indicated claimant "was at a car wash, washing some of the farm equipment." (Claimant's Ex. 1, p. 18) Mr. Phillips was not at a car wash when he fell. He was utilizing a power washer on December 22, 2014 at the employer's farm place where he resided. Dr. Bansal's initial history is inaccurate.

Dr. Bansal notes prior surgeries on claimant's back and neck in 2013 and 2014. (Claimant's Ex. 1, p. 18) However, claimant had MRIs of his lumbar and cervical spine in June 2011, which already demonstrated the fusions in the neck and low back. (Defendants' Ex. C, p. 42) Again, Dr. Bansal's understanding of claimant's medical history is inaccurate or incomplete. In fact, Dr. Bansal's own report is contradictory because he notes medical records review of MRIs on June 15, 2011 from Trinity Regional Medical Center demonstrating the pedicle screws and fixation rods in claimant's lumbar spine as well as plating and fixation in the cervical spine. (Claimant's Ex. 1, pp. 2-3) Review of Dr. Bansal's own report demonstrates the error in his understanding of the history.

It appears that Dr. Bansal had a significant amount of medical records. However, some key medical records are not referenced in his report. For instance, Dr. Bansal does not refer to claimant's Berryhill records, which reference claimant's belief that he has a computer chip implanted in his spine. Dr. Bansal makes no reference to an April 19, 2018 record from Broadlawns Pain Clinic regarding his failed drug test.

Dr. Bansal does not appear to have reviewed (or at least did not summarize) an Advanced Pain Clinic note of February 25, 2015 referencing claimant's vulgar language and threats to clinic staff after his failed drug test. Dr. Bansal does not refer to the fact that claimant had an implanted pain pump at a time prior to 2014. He makes no reference to a December 24, 2015 record from Humboldt County Hospital referencing a fall at home in a parking lot.

Dr. Bansal's report does not refer to an August 14, 2014 record from Humboldt County Memorial Hospital referencing claimant's 15-year history of low back pain. Dr. Bansal makes no reference to a Quest Diagnostics record from September 25, 2013 referencing claimant's positive drug test for methamphetamine. Nor does it appear that Dr. Bansal had a physical therapy record located at Joint Exhibit 2, page 30 regarding his use of a cane 50 percent of the time long before the December 2014 fall. From my review of Dr. Bansal's summary and review of the medical evidence he was provided, many of the records that would be adverse to claimant or suggest potential other causes of claimant's symptoms were not provided, were not reviewed, or at least were not deemed significant enough for Dr. Bansal to summarize. This is concerning and damages the credibility of Dr. Bansal's opinions in this case.

Dr. Bansal does not appear to have been provided a copy of Dr. Stoken's prior independent medical evaluation. Though not asked to do so, Dr. Bansal provides no analysis of why claimant attempted to attribute all symptoms in January 2015 to the police altercation incident in 2011 and then subsequently presented to Dr. Bansal reporting his symptoms were due to the 2014 fall at Kimberley Farms.

Dr. Bansal took a history from claimant that suggested claimant had pain levels of 1 or 2 out of 10 prior to the December 22, 2014 fall. (Claimant's Ex. 1, p. 18) This is simply not true. Dr. Bansal either was not provided all the relevant medical records or misunderstood those records. As discussed previously, claimant had significant pain levels in his neck and low back within the months leading up to the December 22, 2014 fall. In fact, claimant reported significantly higher pain levels to Dr. Stoken and attributed those symptoms to the police altercation in 2011. Mr. Phillips appears to have provided Dr. Bansal an inaccurate or incomplete medical history. Dr. Bansal appears to have relied upon that inaccurate or incomplete medical history in formulating his opinions.

Dr. Stoken was presented with Dr. Bansal's opinions during her deposition and described specific disagreements she had with those opinions. I find Dr. Stoken's understanding of the history, at least as of the time of her deposition, to be more accurate and complete than the history understood by Dr. Bansal. When comparing the opinions of the four physicians that rendered causation opinions, I find the opinions of

Dr. Stoken to be the most informed, complete, and well-reasoned. Dr. Boarini and Dr. Iqbal reached similar conclusions. I accept the opinions of Drs. Stoken, Boarini and Iqbal as the most credible and convincing opinions in this record. I reject the opinions of Dr. Bansal in this case. Therefore, I find that claimant failed to prove his neck, back, or shoulder symptoms are caused by or materially aggravated, accelerated, lit-up, or worsened by the fall on December 22, 2014.

I specifically find that Mr. Phillips has a long-standing, chronic and deteriorating spine condition in both his neck and low back. He has had ongoing and significant symptoms in his neck and low back for decades. I specifically find that claimant has not proven the December 22, 2014 fall caused or materially aggravated any of his current symptoms. Rather, claimant's current condition is related to his long-standing, pre-existing neck and low back conditions. Claimant did not report any left shoulder symptoms to Dr. Stoken at her January 2015 evaluation and I find that the December 22, 2014 fall did not cause or materially aggravate any shoulder injuries.

Mr. Phillips likely experienced a temporary increase in symptoms immediately after the fall. He rested for approximately an hour and a half and then returned to work. He did not miss work thereafter as a result of anything that occurred on December 22, 2014. Claimant failed to prove he sustained any temporary or permanent disability as a result of the December 22, 2014 fall. Similarly, claimant failed to prove that the disputed medical expenses are the result of the December 22, 2014 fall.

Claimant asserts a claim for reimbursement of his independent medical evaluation fee with Dr. Bansal. I find that no physician retained, or selected, by defendants, offered a permanent impairment rating in this case.

Claimant also asserts a claim for penalty benefits. Having found that claimant failed to prove he sustained any disability or incurred any medical expenses as a result of the December 22, 2014 fall and having found that the fall did not cause a substantial and material aggravation, acceleration, lighting up, or worsening of claimant's underlying condition, I find that defendants had a reasonable basis to dispute the claim and to deny any claim for weekly benefits.

CONCLUSIONS OF LAW

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).

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

Having found the medical opinions of Dr. Stoken, Dr. Boarini, and Dr. Iqbal most convincing in this evidentiary record, I also found that claimant did not prove a causal connection between his claims of temporary disability and permanent disability and the December 22, 2014 work injury. Having found that claimant did not prove this causal connection or a permanent and material aggravation of his underlying condition, I conclude that Mr. Phillips has failed to prove entitlement to either temporary disability (healing period) or permanent partial disability benefits.

Mr. Phillips asserted a claim for penalty benefits pursuant to Iowa Code section 86.13. If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, claimant failed to prove entitlement to either healing period or permanent disability benefits. Defendants' position was clearly reasonable and actually prevails in this case. Claimant fails to establish entitlement to any claim for penalty benefits. Iowa Code section 86.13.

Claimant also seeks an award of medical benefits. The employer is required to furnish reasonable medical services for all conditions and injuries that are compensable under the workers' compensation law. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). However, claimant still bears the burden to establish a causal connection between the requested medical expenses and the work injury.

At the commencement of the hearing, counsel had an exchange with the undersigned indicating that medical benefits would only be addressed if the undersigned found a causal connection between the December 22, 2014 work injury and claimant's subsequent treatment and disability. (Tr., pp. 6-7) Having found that claimant failed to prove a causal connection between the December 22, 2014 work injury and subsequent treatment of his neck, low back, and shoulder, I conclude that claimant failed to establish entitlement to an award of medical benefits. Iowa Code section 85.27.

Mr. Phillips also seeks an order requiring defendants to reimburse his independent medical evaluation fees pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

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). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. The Commissioner has held that there must be a permanent impairment rating rendered by a physician selected by the defendants before claimant qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39. Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

In this case, Dr. Bansal offered the only impairment rating in the evidentiary record. Therefore, I conclude that claimant has not established the prerequisites to establish entitlement to Dr. Bansal's independent medical evaluation fees pursuant to Iowa Code section 85.39.

Mr. Phillips asserts this conclusion is erroneous because Dr. Boarini found "no neurological abnormality." Claimant contends, "Dr. Boarini's opinion is equivalent to a zero percent (0%) impairment rating." (Claimant's Post-Hearing Brief, pages 12-13)

However, the commissioner has considered arguments very similar to claimant's current arguments and concluded that medical opinions addressing causation cannot be considered the "equivalent of" an impairment rating. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (Appeal September 2018); Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018). The Commissioner has made it abundantly clear that a medical opinion on some other issue such as causation or restrictions is not the equivalent of an impairment rating. Rather, claimant does not qualify for reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39 unless and until the defendants obtain an impairment rating from a physician of their choosing. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (Appeal September 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (Appeal March 2018); Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal March 2018). Therefore, I conclude that claimant failed to establish entitlement to reimbursement of Dr. Bansal's independent medical evaluation fees pursuant to Iowa Code section 85.39.

Finally, Mr. Phillips seeks an award of costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant failed to establish entitlement to weekly, medical, or penalty benefits. He failed to establish entitlement to reimbursement of his independent medical evaluation. Claimant will take no award of benefits from this proceeding. Therefore, I conclude that it would not be appropriate in this case to assess his costs.

ORDER

THISEFORE, IT IS ORDERED:

Claimant takes nothing.

All parties shall pay their own costs.

Signed and filed this 24th day of April, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.