BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THEODORE J. MALGET,	:	
Claimant,	:	File No. 5048441.01
vs.	:	REVIEW-REOPENING DECISION
JOHN DEERE WATERLOO WORKS,	:	
Employer, Self-Insured, Defendant.	:	Head Notes: 1402.40, 1804, 2501, 2905, 2907

STATEMENT OF THE CASE

Theodore Malget, claimant, received a prior award of worker's compensation benefits in an underlying arbitration proceeding. Specifically, in an arbitration decision filed on August 5, 2015, a former deputy workers' compensation commissioner awarded Mr. Malget 50 percent industrial disability. That decision was appealed.

In the February 14, 2017 appeal decision, the Iowa Workers' Compensation Commissioner affirmed the 50 percent industrial disability award but reversed the award of certain medical benefits in the arbitration decision. However, claimant sought judicial review of the appeal decision and the Iowa District Court remanded the case. On May 23, 2018, the Iowa Workers' Compensation Commissioner entered a remand decision awarding Mr. Malget 60 percent industrial disability.

The current contested case proceeding was initiated when claimant filed a review-reopening petition against John Deere Waterloo Works, as the self-insured employer. This case came before the undersigned for a review-reopening hearing on July 30, 2020. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried via videoconferencing using the CourtCall video platform.

The parties filed a hearing report before the scheduled 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 10, Claimant's Exhibits 1 through 5, and Defendant's Exhibits A through H.

Claimant testified on his own behalf and called his wife, Judy Malget, to testify. No other witnesses testified at trial. The parties submitted Joint Exhibit 10 after the hearing and the evidentiary record closed upon receipt of Joint Exhibit 10.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on September 11, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant has experienced a significant change in condition since the 2015 arbitration hearing.

2. Whether the alleged change in condition is causally related to the work injury.

3. The extent of claimant's entitlement to additional permanent disability benefits, if any.

4. Whether claimant is an odd-lot employee.

5. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses, including a claim for past medical mileage.

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

FINDINGS OF FACT

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

Claimant was 70 years of age at the time of the review-reopening hearing. Mr. Malget lives in Oelwein, Iowa and is a large gentleman, standing 6 feet 6 inches tall and weighing approximately 350 pounds. His educational background and employment background are summarized in the August 5, 2015 arbitration decision, February 14, 2017 appeal decision, and May 23, 2018 remand decision. Obviously, the May 23, 2018 remand decision is the final agency decision. Additional facts were noted in the prior decisions that were not challenged on appeal. All findings of fact contained in the remand decision and unchallenged facts found in the arbitration decision and appeal decision are adopted without reiteration in this decision. Mr. Malget has not sought further education or employment since the 2015 arbitration hearing. (Claimant's testimony)

The initial factual dispute in this case is whether Mr. Malget sustained a substantial change in his physical condition since the 2015 arbitration hearing. It is undisputed that

Mr. Malget sustained an L4 burst fracture as a result of his work duties at John Deere Waterloo Works on September 8, 2011. At the time of the 2015 arbitration hearing, Mr. Malget proved he sustained a 60 percent industrial disability as a result of the September 8, 2011 work injury. (Remand Decision, page 6)

Prior to the arbitration hearing, claimant had not submitted to any surgical intervention on his back. He established that he had a permanent impairment of the whole person ranging from 21 to 23 percent. (Remand Decision, p. 2) Mr. Malget was on Social Security Disability benefits at the time of the 2015 arbitration hearing. Claimant also produced a vocational report at the time of the arbitration hearing that opined he was not able to find employment within the competitive labor market. (Remand Decision, p. 3)

Since the arbitration hearing, Mr. Malget has sought additional medical care for his back. In May 2016, claimant reported 10 out of 10 pain levels in his low back. (Joint Ex. 2, p. 4) By November 2016, claimant requested referral to Mayo Clinic for further evaluation of his low back. (Joint Ex. 2, p. 8)

A nurse practitioner evaluated Mr. Malget at Mayo Clinic in January 2017 and recommended a surgical decompression of the neural elements in claimant's lumbar spine as a result of both degenerative changes and the burst fracture. The nurse practitioner referred claimant for neurosurgical follow-up with W. R. Marsh, M.D. (Joint Ex. 1, pp. 2-3)

Dr. Marsh evaluated claimant on January 25, 2017 and recommended back surgery. (Joint Ex. 1, p. 4) Claimant testified that the purpose of the recommended surgery was to decrease his low back pain. (Claimant's testimony) On February 23, 2017, Dr. Marsh took claimant to surgery and performed a laminectomy from L2 through L5, along with a repair of a dural tear. (Joint Ex. 1, p. 10) Unfortunately, claimant did not experience improvement or change in his symptoms after the surgery and reported his symptoms actually worsened after surgery. (Joint Ex. 1, pp. 24, 26; Claimant's testimony) Claimant testified that he experienced the same type of pain and in the same location even after the 2017 laminectomy surgery. (Claimant's testimony) By September 2018, claimant reported he could only walk 25 feet before he experienced significant pain in his low back. (Joint Ex. 1, p. 25)

Due to the ongoing symptoms, Mr. Malget was recommended and referred for a spinal cord stimulator trial. (Joint Ex. 1, p. 26) That stimulator trial occurred on January 29, 2019 and appeared to be successful. (Joint Ex. 1, p. 44; Claimant's testimony) Permanent placement of a spinal cord stimulator was performed on March 27, 2019. (Joint Ex. 1, pp. 73-75) Unfortunately, claimant did not experience improvement of his symptoms after the stimulator was surgically placed. (Joint Ex. 1, p. 80)

Mr. Malget testified that he has not worked since the 2015 arbitration hearing, has not looked for work during that time, and does not intend to look for work moving forward. He testified that his pain levels have dramatically increased in the last two years. He

testified that his symptoms are more intense recently and that it requires less activity to aggravate his back since the 2015 arbitration hearing. (Claimant's testimony)

Specifically, Mr. Malget testified that he cannot stand or walk as long as he could in 2015 and that his pain symptoms occur and rise sooner now than they did at the time of the 2015 arbitration hearing. He explained that his back pain will now start at a 7 out of 10 pain level when he stands but will increase to a 9 out of 10 pain level after a minute of standing. Claimant testified this is worse than it was at the time of his 2015 hearing, and he estimated that his pain level at the time of the 2015 hearing was probably in the 5-6 out of 10 pain level. (Claimant's testimony)

Mr. Malget also testified that he cannot walk any distances now. He testified to difficulties now going shopping or attending his grandchildren's activities. Therefore, he testified that he now uses a motorized wheelchair. This is a new development within the six months before the review-opening hearing. (Claimant's testimony)

When asked to compare his abilities at the time of the 2015 hearing and currently, Mr. Malget testified that he was able to mow his law with a riding lawn mower, trim and rake a little at a time in 2015. However, Mr. Malget indicated that now he is unable to stand on uneven ground, mow, trim, or rake. Mr. Malget also testified he was able to do some minimal home projects such as woodworking for a couple hours at a time in 2015. He denies that he can do these types of home projects at the present time. (Claimant's testimony)

Claimant testified that his tolerance for driving is also reduced since the 2015 hearing. He testified that he could drive to Waterloo or Cedar Rapids by himself in 2015. However, claimant testified that some days he cannot drive at all now. Mr. Malget also testified that his balance is worse now than in 2015, that his energy levels have decreased since 2015, and that he now requires afternoon naps but did not need naps at the time of the 2015 hearing. (Claimant's testimony)

Claimant's wife, Judy Malget, also testified at hearing. Mrs. Malget testified that claimant definitely has experienced increases in his pain since the 2015 hearing. She testified that claimant now limits his activity and that everything is harder for Mr. Malget because of his symptoms. She confirmed that Mr. Malget used to do most of his own yard work in 2015 but that the couple now pays for their yard work to be completed. She confirmed that claimant used to walk to attend grandchildren's events in 2015 but that he cannot do so now. She testified that claimant missed many activities until he recently obtained a motorized wheelchair. (Judy Malget testimony)

Mrs. Malget testified that claimant's energy level has clearly dropped since the 2015 hearing. Although she conceded that energy levels decrease as individuals age, she noted that claimant did not require naps in 2015 but does require them at the present time. She estimated this is a new development within the past one to two years. Mrs. Malget also conceded that claimant experienced a heart attack and required two stents. (Judy Malget testimony)

Review of the medical evidence demonstrates that claimant has not experienced a change in his permanent impairment rating. At the time of the 2015 arbitration hearing, Robert Broghammer, M.D. assigned claimant a 21 percent permanent impairment of the whole person as a result of his burst fracture and underlying degenerative conditions. Claimant's independent medical evaluator at the time, Ray F. Miller, M.D., assigned claimant a 23 percent permanent impairment and another independent evaluator, Marc Hines, M.D., assigned a 23 percent impairment as well.

Dr. Broghammer reiterated the 21 percent permanent impairment rating in this proceeding. (Joint Ex. 7, p. 1) Claimant sought an evaluation with John Kuhnlein, M.D. in this review-reopening proceeding. Dr. Kuhnlein concluded that claimant has a 23 percent permanent impairment of the whole person as a result of his work injury. (Claimant's Ex. 1, p. 17) Dr. Kuhnlein's impairment rating is convincing and accepted as accurate. It establishes that claimant's impairment remains the same as the impairment assigned by Dr. Miller and Dr. Hines at the time of the 2015 arbitration hearing.

Dr. Kuhnlein documents that there has been no change in claimant's dosages of fentanyl or hydrocodone since the 2015 arbitration hearing, though Dr. Kuhnlein documented that claimant takes those medications more frequently at the present time. (Claimant's Ex. 1, p. 15) Arguably, the increased frequency of medication usage documents a change in symptoms and substantial change in condition. I find that claimant does use pain medications more frequently now than he did at the time of the 2015 arbitration hearing.

Mr. Malget quit attempting to find employment prior to the 2015 arbitration hearing. He has made no efforts to find employment since the 2015 hearing. Nothing in this respect has changed since the 2015 hearing.

Certainly, Mr. Malget submitted to significant additional medical treatment for his condition since the 2015 hearing, including a multi-level laminectomy and implantation of a spinal cord stimulator. However, Mr. Malget testified that none of this additional treatment made any difference in his symptoms or offered any improvement in his function. Accordingly, the additional medical treatment, standing alone, is not really evidence of a substantial change in condition.

Defendants challenge causal connection of the current condition to the initial work injury on September 8, 2011. However, defendants essentially appear to recycle old evidence that they offered at the time of the arbitration hearing. Defendants persist in offering the medical opinions of Dr. Broghammer, asserting that the current condition is related to degenerative changes and not the burst fracture. Dr. Broghammer's causation opinions were rejected by the deputy commissioner, commissioner's designee, and ultimately by the commissioner in the arbitration decision, appeal decision, and remand decision in the underlying proceeding.

It is possible that there could be a different cause of the current decline in function than the cause of claimant's condition at the time of the arbitration hearing. However, Dr. Broghammer's opinions and conclusions about the cause are very similar to those he

offered at the time of the arbitration hearing. Those opinions were not found to be convincing at the time of the arbitration hearing. I similarly do not find Dr. Broghammer's opinions on causation to be convincing in this review-reopening proceeding. Mr. Malget sustained a burst fracture in his lumbar spine on the date of injury, that burst fracture causes significant symptoms and industrial disability at the time of the 2015 arbitration hearing.

The burst fracture and resulting condition caused further deterioration and worsening of claimant's function and increase of his symptoms since the 2015 hearing. I accept the opinions of Dr. Kuhnlein as most credible and convincing in this evidentiary record. I accept Dr. Kuhnlein's opinions that the laminectomy and subsequent spinal cord stimulator are both causally related to the initial burst fracture and work injury. (Claimant's Ex. 1, p. 16) Although anticipation of future deterioration or treatment is not necessarily the standard for review-reopening hearings, I accept Dr. Kuhnlein's opinion that "the surgical procedures [and] the spinal cord stimulator procedures would not have been anticipated at the time of the January 15, 2015 arbitration, but the procedures at the Mayo Clinic were performed for the claudication symptoms and chronic pain that I believe are related to the September 8, 2011, work injury." (Claimant's Ex. 1, p. 16)

More importantly, I accept Dr. Kuhnlein's opinion that "Mr. Malget's function has changed since the time of the January 15, 2015, arbitration." (Claimant's Ex. 1, p. 16) Indeed, claimant now uses a cane for ambulation and a motorized wheelchair for moving longer distances. He did not require use of a cane or a wheelchair at the time of the 2015 arbitration hearing. (Claimant's Ex. 1, p. 12; Claimant's Ex. 2, p. 2; Claimant's testimony; Judy Malget testimony)

At the time of the 2015 arbitration hearing, Mr. Malget was able to do at least minimal woodworking, yard chores, and was able to walk sufficiently to attend his grandchildren's events. At the present time, Mr. Malget is unable to do his woodworking hobby, perform yard chores, and requires the use of a motorized wheelchair to attend grandchildren's events. I find it difficult to assess energy level and whether that is causally related to the work injury. Claimant has obviously aged five years since the arbitration hearing. He sustained a heart attack in 2016. (Claimant's Ex. 1, p. 13) It cannot determine whether claimant's lack of energy or need for naps are directly causally related to his work injury, aging, or heart attack.

However, I accept Dr. Kuhnlein's opinion that claimant requires a 10-pound lifting restriction and that he cannot lift over shoulder height. I accept Dr. Kuhnlein's opinion as credible and convincing that claimant must be permitted to sit, stand, and walk as tolerated and that he will need to change positions every few minutes in the workplace. (Claimant's Ex. 1, p. 17) I further accept Dr. Kuhnlein's opinion that claimant has significant physical limitations at the present time "that would, in essence, preclude him from the job market." (Claimant's Ex. 1, p. 17) I further accept Dr. Kuhnlein's opinion that "it is highly unlikely that he would return to work." (Claimant's Ex. 1, p. 17) To the extent that she concurs with Dr. Kuhnlein in these respects, I also acknowledge and accept the opinion of Lindy Tommasin, ARNP. (Claimant's Ex. 2)

I accept Dr. Kuhnlein's opinion that Mr. Malget achieved maximum medical improvement on April 26, 2019. (Claimant's Ex. 1, p. 16) No additional treatment is being recommended and none is suggested to significantly improve claimant's functional abilities or render him capable of returning to work. Therefore, I find that Mr. Malget is at maximum medical improvement and that it is appropriate to re-evaluate his permanent disability at this time.

Having considered Mr. Malget's age, educational and employment backgrounds, the length of time he has been out of the workforce, the unlikely ability for retraining, his permanent impairment, claimant's permanent physical restrictions, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Malget has proven he is incapable of performing work that is consistent with his experience, training, education, intelligence, and physical capabilities as a result of his September 8, 2011 work injury. Realistically, claimant is no longer capable of obtaining or performing employment within any well-known branch of the labor market because his residual abilities are so limited that a reasonably stable labor market does not exist for Mr. Malget.

CONCLUSIONS OF LAW

This case involves a claim for review reopening and an increase in permanent disability benefits by claimant. Specifically, Mr. Malget asserts that his condition has worsened and he has experienced a significant change in his condition since the 2015 arbitration hearing. Mr. Malget asserts that he is entitled to permanent total disability benefits as a result of this worsening of his condition. Defendants dispute whether claimant has proven a change in condition that is casually related to the work injury and also challenge the extent of claimant's entitlement to additional permanent disability benefits, if any.

Upon review reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a difference determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a substantial and discernible manner since the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). However, it makes no difference whether the change in condition since the arbitration hearing was anticipated or unanticipated. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391-392 (Iowa 2009). Instead, the commissioner found the facts at the time of the 2015 arbitration hearing and the question in this review-reopening proceeding is whether there has been a substantial change in condition since the arbitration hearing that remains causally related to the initial work injury. Id. at 392. Of course, claimant may not re-litigate facts that were known or knowable at the time of the arbitration hearing. Id. at 393.

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).

I accepted the causation opinions of Dr. Kuhnlein, as well as his opinion that claimant's functional abilities have changed since the 2015 arbitration hearing. I also accepted Dr. Kuhnlein's opinions that these changes, as well as the low back surgery and implantation of a permanent spinal cord stimulator, are causally related to the work injury. Having found that Mr. Malget proved a substantial and causally related change in condition since the 2015 arbitration hearing, I conclude claimant has established entitlement to review reopening. Once the substantial change in condition is established, the agency considers the relevant industrial disability factors to determine whether an increase or decrease in the initial arbitration award (remand decision in this instance) is warranted. Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 435 (Iowa 1999).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Mr. Malget asserts that the worsening of his condition since the 2015 hearing results in him being permanently and totally disabled.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

I considered all of the relevant factors outlined by the Iowa Supreme Court to assess industrial disability. I found that Mr. Malget proved he is incapable of performing work that is consistent with his experience, training, education, intelligence, and physical capabilities as a result of his September 8, 2011 work injury. I further found that claimant is no longer capable of obtaining or performing employment within any well-known branch of the labor market because his residual abilities are so limited that a reasonably stable labor market does not exist for Mr. Malget. As a result of these factual findings, I conclude that Mr. Malget proved he is permanently and totally disabled as a result of the underlying work injury.

Mr. Malget also asserted an odd-lot claim in this review-reopening proceeding. I do not consider or enter any findings or conclusions relative to the odd-lot claim because I find claimant proved his permanent total disability using the traditional industrial disability analysis and that he does not need to rely upon the burden-shifting principles of the odd-lot doctrine to prevail.

Mr. Malget also seeks an award of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer

has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant contends that the past medical expenses should be awarded because defendant appealed the arbitration decision and offered claimant no medical care between the date of the 2015 arbitration hearing and the entry of the May 23, 2018 remand decision by the Commissioner. Claimant contends that defendant denied liability during this period, as evidenced by its appeal of the underlying arbitration decision. Therefore, claimant contends, he was entitled to select his own medical care, that defendant has no authorization defense and that defendant should be ordered to pay for the past medical expenses contained in Claimant's Exhibit 4.

Defendant challenges claimants' entitlement to an award of past medical expenses. Defendant contends that claimant failed to follow the requirements of Iowa Code section 85.27 to obtain authorized medical care. Specifically, defendant contends that none of the medical care rendered at Mayo Clinic, including the low back surgery and the spinal cord stimulator, was authorized medical care. Defendant contends that claimant can only obtain award and payment of unauthorized medical care if it is reasonable and beneficial as defined in Bell Brothers Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

Following the 2015 arbitration hearing, the prior deputy commissioner awarded alternate medical care. However, that award was appealed and was only a proposed decision of the agency. Defendant continued to deny liability during the interim intra-agency appeal. During the period between the 2015 arbitration hearing and issuance of the appeal decision on February 14, 2017, defendant continued to deny liability for claimant's condition. Accordingly, they are not permitted to dispute claimant's medical expenses during this period of time based upon an authorization defense. Brewer-Strong v. HNI Corporation, 913 N.W.2d 235, 242 (Iowa 2018). Typically, I would conclude under this set of facts defendant does not have an authorization defense during the period of their denial before the February 14, 2017 arbitration decision. Id.

However, in this instance, the Commissioner found that the alternate medical care was not warranted in the appeal decision. Accordingly, the care obtained prior to the appeal decision was not authorized and presumably, defendant retained its authorization defense. This leaves a strange and somewhat troubling area in the law where a claimant wins, relies upon the deputy's proposed arbitration decision, only to find out later that the proposed decision was wrong and lose the protections offered by the initial order. To my knowledge, however, there is not controlling authority about specifically what happens under these circumstances. I conclude that defendant retained its right to direct care and that claimant continued to fail to meet the requirements of Iowa Code section 85.27 for alternate medical care between the issuance of the arbitration decision and the appeal decision.

Therefore, I conclude defendant has an authorization defense for the treatment rendered between the arbitration hearing and the appeal decision. Claimant clearly

produced no evidence that John Deere authorized the treatment and defendant produced evidence clarifying that it clearly was not authorized. Therefore, claimant can only overcome the authorization defense if he can establish that the treatment was reasonable and beneficial. Bell Brothers Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

In this instance, the evidence clearly demonstrated that claimant did not receive any benefit from the treatment rendered between the arbitration hearing and the issuance of the February 14, 2017 appeal decision. Therefore, I conclude that the medical expenses during that period cannot be awarded under Iowa Code section 85.27. Id.

Once the appeal decision was issued on February 14, 2017, that decision denied alternate medical care. The appeal decision specifically denied alternate medical care because claimant failed to give notice of dissatisfaction or follow the statutory scheme to obtain alternate medical care. (Appeal Decision, p. 24) In fact, the Commissioner noted:

> Claimant did not follow the procedure provided under Iowa Code section 85.27(4) to seek alternate medical care. He did not communicate his dissatisfaction with the care John Deere had offered him. Claimant did not inform representative of John Deere the care being offered was not reasonably suited to treat claimant's work-related condition nor did claimant argue the treatment being offered was unduly inconvenient. Claimant made no request for a transfer of care to his family practitioner and/or Nurse Tommasin. Claimant did not satisfy the essential requirements of Iowa Code section 85.27(4). Consequently, claimant is not entitled to alternate medical care.

(Appeal Decision, p. 24)

Claimant did not heed the admonition offered by the Commissioner in his February 14, 2017 appeal decision. Instead, nine days later on February 23, 2017, claimant proceeded to back surgery at Mayo Clinic. Claimant offered no evidence that he gave notice of his dissatisfaction or sought authorized care through John Deere after issuance of the appeal decision and before the back surgery on February 23, 2017. Instead, claimant proceeded with unauthorized medical care under the same conditions outlined in the appeal decision.

Claimant continued to seek unauthorized medical care and offered no evidence that he sought authorization of medical care or gave notice of his dissatisfaction to John Deere between February 14, 2017 and the review-reopening hearing. Defendant produced specific evidence establishing that authorization was never given for the treatment at Mayo Clinic, including the February 23, 2017 back surgery, the March 27, 2019 spinal cord stimulator, or any related medical care. Accordingly, I conclude that the authorization defense applies and that claimant failed to overcome that defense for the reasons outlined above and in the February 14, 2017 appeal decision. I conclude

that the medical expenses claimed in Claimant's Exhibit 4 must be denied pursuant to Iowa Code section 85.27. Bell Brothers Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has prevailed on his review-reopening claim and received additional permanent disability benefits. I conclude it is appropriate to assess his costs in some amount.

Mr. Malget seeks assessment of his filing fee ($100.00). This is a reasonable and permissible cost. Claimant's filing fee is assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the independent medical evaluation performed by Dr. Kuhnlein. The expense of Dr. Kuhnlein's evaluation and review of medical records is not a taxable cost. Only the cost of Dr. Kuhnlein's report is a potentially taxable cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Claimant's Exhibit 5, page 2 demonstrates that Dr. Kuhnlein charged $2,545.00 to draft his independent medical evaluation performed in November 2019 resulting in a report dated March 7, 2020. The remainder of Dr. Kuhnlein's charges are related to his evaluation and not taxable. I find the $2,545.00 in charges to be on the upper end of reasonableness for the drafting of a report and note that Dr. Kuhnlein charged nothing for review of records as part of his evaluation. Regardless, I find this to be within the range of reasonableness given the volume of records and complexity of the issues involved in this case. I conclude that $2,545.00 of Dr. Kuhnlein's report fees should be taxed as costs pursuant to 876 IAC 4.33(6).

Claimant also seeks to tax a supplemental report authored by Dr. Kuhnlein. Claimant's Exhibit 5, page 4 demonstrates that Dr. Kuhnlein charged $855.00 for drafting a second letter report in this case. That letter responded to a report from Dr. Broghammer. I understand why claimant wanted that rebuttal letter. However, I did not rely upon that letter to a great extent and find that the above charges totaling $2,545.00 are a reasonable and appropriate amount to assess as costs for this expert opinion. I decline to assess additional charges for the supplemental report.

Finally, Mr. Malget seeks assessment for the charges he incurred to obtain a copy of his deposition transcript. Defendants elected to introduce that deposition transcript as Defendant's Exhibit A. Therefore, it is reasonable for claimant to obtain a copy of the transcript and reasonable to assess claimant's cost for the transcript. I assess claimant's cost ($38.50) for the deposition transcript pursuant to 876 IAC 4.33(2). Therefore, I assess claimant's costs in the amount of $2,583.50. Iowa Code section 86.40.

ORDER

THEREFORE, IT IS ORDERED:

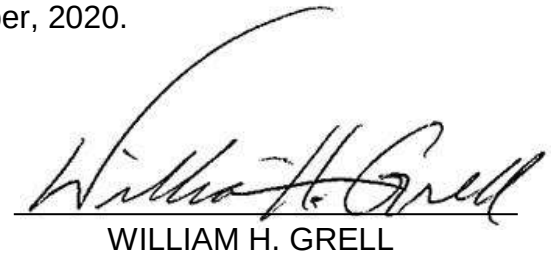
Defendant shall pay claimant permanent total disability benefits on a weekly basis commencing on May 25, 2017 through the present and continuing into the future until claimant's disability ends at the stipulated weekly rate of seven hundred and 70/100 dollars ($700.70) per week.

The employer shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall reimburse claimant's costs in the amount of two thousand five hundred eighty-three and 50/100 dollars ($2,583.50).

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 24th day of November, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Thomas Wertz (via WCES)
James Kalkhoff (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.