BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEANDRE JEFFERSON,

Claimant,

vs.

CALLOS RESOURCE, LLC,

Employer,

and

ACE PROPERTY AND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5051077

ARBITRATION DECISION

Head Note Nos.: 1100; 1801; 4000.2

STATEMENT OF THE CASE

Claimant, DeAndre Jefferson, filed a petition in arbitration seeking workers' compensation benefits from Callos Resources, LLC, employer, and ACE American Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on August 29, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on September 2, 2015, in Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 21 and the testimony of the claimant and Michael Noltensimeyer. The parties submitted post-hearing briefs, the matter being fully submitted on October 2, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on August 29, 2014 which arose out of and in the course of his employment;

2. Whether the alleged injury is a cause of temporary disability;

3. Claimant's entitlement to temporary disability benefits from August 29, 2014 to the present;

4. Whether the alleged injury is a cause of permanent disability;

5. The extent of claimant's industrial disability;

6. The commencement date for permanent partial disability benefits;

7. Whether defendants are responsible for various medical expenses;

8. Whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27;

9. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much;

10. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39; and

11. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

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 deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. During the course of evidentiary hearing, the undersigned observed claimant demonstrate pain behavior consistent with a low back injury, such as slowly rising from a seated position.

Claimant was 39 years of age at the time of hearing. Claimant is engaged and the father to an adult daughter. (Claimant's testimony) He resides in Newton, Iowa, but grew up in the Des Moines metropolitan area. (Exhibit 11, page 2) Claimant attended high school through the 9th grade; he subsequently earned his GED while incarcerated. Claimant also participated in some coursework at Des Moines Area Community College, but did not secure a degree. (Claimant's testimony; Ex. 11, p. 2; Ex. 14, p. 2)

Claimant's work history includes experience as a certified forklift operator. (Claimant's testimony; Ex. 11, p. 3; Ex. 14, p. 3) Claimant was subsequently incarcerated from 1996 to 2006 for first degree robbery. While incarcerated, claimant performed various duties, including groundskeeping, telemarketing, janitorial, maintenance, and as a stacker and roll tender for Rock Communications. (Claimant's testimony; Ex. 11, pp. 3-4, 11) Following release from prison, claimant performed

assembly line and warehouse work through staffing agencies, loaded and unloaded vehicle tires, cut and stacked fiberglass, and moved and assembled office furniture. (Claimant's testimony; Ex. 11, pp. 4-6; Ex. 14, pp. 3-4) At some point, claimant committed a probation violation and returned to prison. (Ex. 11, p. 11)

Claimant was ultimately hired by defendant-employer and placed at a tire company, Advanced Wheels and Tires (Advanced Wheels). At Advanced Wheels, claimant stacked tires and loaded and unloaded trucks. Claimant performed such work for approximately three months. (Claimant's testimony; Ex. 11, p. 6; Ex. 14, p. 4)

Claimant's relevant medical history includes a June 1995 emergency room visit with complaints of mid-back pain. The medical record from Broadlawns Medical Center (Broadlawns) reveals claimant suffered these complaints after lifting a television. Claimant was assessed with a muscle strain and advised to use Flexeril and Motrin. (Ex. 4, p. 1)

While incarcerated, claimant received mental health care from psychologist, Steve Perlowski. Claimant presented to Mr. Perlowski on December 8, 2003. Mr. Perlowski noted claimant had been diagnosed with schizophrenia on May 15, 2002. During his treatment, claimant claimed his food was being poisoned and claimed to experience hallucinations, such as conversations with Malcolm X and Martin Luther King, Jr., during which the hallucinations reportedly advised claimant "not to trust the white man." Claimant later admitted to Mr. Perlowski that he did not truly experience these psychotic symptoms and indicated he did not harbor prejudice against Caucasians. Mr. Perlowski opined he did not believe claimant was schizophrenic. Mr. Perlowski opined claimant's "desire/need to make sense of life" had resulted in "curious" actions such as feigning symptoms of mental illness "in order to experience the antidote (i.e., anti-psychotic medications)." (Ex. 5, p. 1) On December 11, 2003, claimant presented to Department of Corrections Health Services, in order to "convince" the medical staff his schizophrenia diagnosis had been incorrect. Claimant admitted he fabricated his past symptoms. (Ex. 5, p. 2)

On January 16, 2007, claimant presented to the Broadlawns emergency room with complaints of low back and neck pain for 2 days, following a motor vehicle accident where he struck his head upon a dash. Claimant was assessed with cervical and lumbar strains. Conservative treatment included one week of light duty work, as well as use of prescriptions for Flexeril, Naprosyn, and Vicodin. (Ex. 4, pp. 2-7)

While at work at Advanced Wheels on the morning of Friday, August 29, 2014, claimant alleges he suffered a work related injury. Claimant testified he laid down a pallet, placed a piece of cardboard on top of the pallet, and was rolling a semi tire onto the pallet when his foot slipped on the cardboard. Claimant testified he felt a crack in his back and developed sharp pain in his back and radiating down his right leg. He mentioned the event to coworker, David Smith, and attempted to keep working with his symptoms. Around lunch time, supervisor, Troy James, provided the temporary

workers the option to leave. Claimant testified it was not unusual for Advanced Wheels to provide temporary workers the option to leave early on slow days. Claimant testified he, and other employees, took advantage of the option to leave at lunch. He did not recall if he informed Mr. James of his intention to leave. (Claimant's testimony; Ex. 11, pp. 8-9)

Claimant testified he attempted to rest his back on the afternoon and evening of August 29, 2014. When he did not improve, claimant presented to the emergency room the following day. (Claimant's testimony) Medical records from Skiff Medical Center (Skiff) dated August 30, 2014 reveal claimant was evaluated by Daniel Wright, D.O. Claimant complained of low back pain. Dr. Wright assessed a lumbar strain with spasm and prescribed Naprosyn and Flexeril. (Ex. 3, pp. 1-2)

The next business day, Monday September 1, 2014, claimant returned to Advanced Wheels. He informed his supervisor, Mike, of the injury on August 29, 2014 and provided a copy of the medical paperwork from Skiff. (Claimant's testimony; Ex. 11, p. 9) Claimant and Mike agreed to allow claimant a couple days off of work. Mike advised claimant to return to work on Thursday, September 4, 2014. When claimant returned on Thursday, Mike informed claimant defendant-employer had made the decision to terminate claimant from the placement at Advanced Wheels. (Claimant's testimony)

Michael Noltensimeyer testified at evidentiary hearing. Mr. Noltensimeyer is a supervisor at Advanced Wheels. Mr. Noltensimeyer testified he and Mr. James were not aware claimant had elected to exercise the option to leave early on the afternoon of Friday, August 29, 2014. On Monday, September 1, 2014, claimant returned to work and reported he sustained an injury on Friday and provided copies of medical records which indicated claimant had been seen in the emergency room for back pain. At that time, Mr. Noltensimeyer completed paperwork for Advanced Wheels and defendant-employer regarding the reported injury. Mr. Noltensimeyer testified he informed defendant-employer that claimant had left early on Friday and returned on Monday with medical records reporting a work injury. Mr. Noltensimeyer testified as claimant was an employee of defendant-employer and not Advanced Wheels, he was bound to abide by the decision of defendant-employer with respect to claimant's continued employment. (Mr. Noltensimeyer's testimony)

Mr. Noltensimeyer's testimony was consistent with the evidence in the written record and claimant's testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt Mr. Noltensimeyer's veracity. Mr. Noltensimeyer is found credible.

On October 9, 2014, claimant presented to Daniel McGuire, M.D. of Iowa Spine Care. Claimant reported injuring his back three or four weeks prior while working at Advanced Wheels. Claimant indicated his foot slipped, resulting in claimant wrenching his back. Claimant denied prior back problems. On examination, Dr. McGuire noted

back pain with movement of the right hip and right leg and limited spinal motion. Dr. McGuire assessed work-related soft tissue back pain. He recommended a treatment plan involving removal from work for two to three months and initiation of a home stretching program. Dr. McGuire advised claimant to return for follow-up in two weeks. (Ex. 1, p. 1)

Claimant returned to Dr. McGuire on October 23, 2014. Dr. McGuire noted "basically no improvement" in claimant's condition, with continued tightness of the hamstrings and limited forward flexion. Dr. McGuire opined claimant's condition was muscular-type back pain and would take months to resolve. Dr. McGuire advised claimant to have his attorney contact Dr. McGuire regarding potentially pursuing a more aggressive course of care. (Ex. 1, p. 2)

On October 24, 2014, defendants' counsel authored a letter to claimant's counsel confirming the occurrence of a prior telephone conversation regarding defendants' denial of compensability with respect to claimant's alleged injury. Defendants' counsel indicated if claimant desired additional "particulars" in writing, to let counsel know. (Ex. 18, p. 1)

A handwritten note dated November 6, 2014 is included on claimant's October 23, 2014 medical note from Dr. McGuire's office. The note is initialed "D.M.", and presumably authored by Dr. McGuire. The note indicates no change in claimant's condition, with tight muscles and low back pain, for which Dr. McGuire recommended stretching. (Ex. 1, p. 2)

On November 12, 2014, claimant's attorney authored a letter to Dr. McGuire, purporting to summarize Dr. McGuire's opinions as expressed in a prior conference. Dr. McGuire signed the document on November 13, 2014, expressing his agreement to the statements. Dr. McGuire thereby opined claimant's work injury was a substantial causal, contributing or aggravating factor in claimant's current back condition. Dr. McGuire opined claimant required physical therapy and once that therapy began, he anticipated a 3 to 6 month recovery period. Dr. McGuire opined claimant could work light duty for 2 to 3 hours per day and involving weights of up to 8 to 12 pounds from an occasional to frequent basis. (Ex. 1, p. 3)

On November 13, 2014, claimant's counsel authored a letter to defendants' counsel noticing service of medical records and asking defendants to reconsider their denial of liability given Dr. McGuire's opinion attributing claimant's back complaints to the work injury. In the event defendants did not reconsider, claimant's attorney requested notification of the basis for defendants' continued denial. (Ex. 18, p. 2)

On November 20, 2014, claimant returned to Dr. McGuire for evaluation. Dr. McGuire indicated claimant's condition had not shown much improvement. He again opined claimant's symptoms were work related. Dr. McGuire recommended claimant begin a course of physical therapy. He released claimant to light duty work a

couple hours per day, with lifting of five to eight pounds, and minimal bending and twisting. Dr. McGuire advised claimant to return to the clinic for evaluation on December 4, 2014. (Ex. 1, pp. 4-5)

Claimant sought employment and was hired as a cook at Kentucky Fried Chicken (KFC) on November 20, 2014. He began working part time hours and eventually progressed to full time work. Claimant earned $7.25 per hour. (Claimant's testimony; Ex. 11, p. 6; Ex. 19, pp. 2, 18)

At the order of Dr. McGuire, claimant began a course of physical therapy at Skiff. On December 1, 2014, claimant underwent an initial session with Matthew Scotton, PT. Claimant reported he sustained an injury on August 29, 2014 when his left foot slid out from under him while working with a heavy tire and he felt sudden pain. Although claimant attempted to continue working, he ultimately left work early around lunchtime. Claimant reported nearly constant right low back and buttock pain with radiation to the right thigh. He described a sharp back pain, as well as a constant sensation of tightness of the back. Claimant also reported a feeling of weakness of the right leg and occasional tingling of the right thigh. On examination, Mr. Scotton noted considerable tenderness to palpation of the lumbar paraspinals and posterior hip muscles. Mr. Scotton also noted a positive straight leg raise test and hip range of motion limited by right low back pain. (Ex. 3, p. 7) Mr. Scotton assessed right low back, buttock and posterior thigh pain from a strain sustained when claimant's foot slipped on August 29, 2014. He initiated a course of therapy and advised claimant on a home exercise program. (Ex. 3, pp. 8, 21)

Dr. McGuire's medical notes contain another handwritten note dated December 4, 2014. The note was undecipherable with the exception of a direction for claimant to return to the clinic on December 18, 2014. (Ex. 1, p. 4)

On December 5, 2014, claimant's attorney authored a letter to defendants' attorney, enclosing an alternate medical care petition and requesting the basis of defendants' denial of liability. (Ex. 18, p. 3)

Dr. McGuire's medical notes contain another handwritten note dated December 18, 2014. This note indicates claimant had a new job at KFC and references "moderation" and "exercise." (Ex. 1, p. 4)

Claimant continued to participate in physical therapy sessions at Skiff, including on December 19, 2014; December 30, 2014; January 6, 2015 and January 20, 2015. (Ex. 3, pp. 12-26)

On January 15, 2015, Troy James of Advanced Wheels authored a written statement. By his statement, Mr. James indicated claimant never returned from lunch on the alleged date of injury and did not advise Mr. James he would not be returning. He further indicated on alleged date of injury, claimant "never reported any injury to me

and I never saw anything out of the ordinary that [claimant] was doing that would have caused an injury." Mr. James indicated he learned of claimant's alleged injury on the following Monday. (Ex. 15, p. 1)

On January 20, 2015, defendants' counsel authored an email to claimant's counsel, providing a copy of Mr. James' statement. Defendants' counsel represented that based on the content of the statement, defendants continued to deny liability for claimant's alleged work injury. (Ex. 18, p. 10)

On February 17, 2015, claimant presented to the Newton Clinic and was evaluated by Zachary Alexander, M.D. Claimant complained of consistent right middle back pain, dating to an injury he sustained stacking tires. Claimant also complained of radiation of pain down his right leg to his knee. (Ex. 2, p. 1) Dr. Alexander noted claimant already had an existing course of physical therapy established; he recommended claimant utilize Tylenol on an as needed basis. (Ex. 2, p. 2)

Claimant voluntarily left his employment at KFC on February 18, 2015 in order to pursue self-employment. (Ex. 11, p. 6; Ex. 19, p. 1) Claimant testified he founded Home and Global, an internet affiliate marketing business. As part of his business, claimant creates online advertisements designed to market the products and services of other companies. Claimant derives income via commission when customers purchase goods or services through his advertisement. Claimant has thus far profited $136.00 in his self-employment endeavor. (Claimant's testimony; Ex. 11, pp. 6-7)

On March 18, 2015, claimant's former coworker, David Smith, authored a written statement. Mr. Smith represented he had previously worked with claimant, performing work which required lifting tires weighing 150 to 200 pounds. Mr. Smith stated:

> On Friday before Labor Day, [claimant] hurt his back. I think it was about mid morning because he told me about 10:00 A.M. His back was getting worse so just before noon [claimant] told the boss Troy, that his back was hurting. Troy told him that we were slow so go ahead [and] take off.

(Ex. 15, p. 2)

Claimant testified he reviewed and agreed with the majority of Mr. Smith's written statement. However, claimant testified he did not recall if he informed Mr. James of the injury on August 29, 2014. Claimant testified he was certain his reported the injury on the following Monday, September 1, 2014. (Claimant's testimony)

Defendants ordered surveillance of claimant which was performed in late March and early April 2015. (Ex. 16, pp. 1-2) No substantive surveillance evidence was offered into the evidentiary record.

On June 1, 2015, claimant presented to the Newton Clinic and was evaluated by Andrew Cope, D.O. Claimant complained of jock itch; Dr. Cope's notes describe

claimant as an athlete who plays soccer. Dr. Cope prescribed Lamisil. Dr. Cope also noted the following with respect to claimant's psychological status: "[Claimant] expresses his distrust in physicians and accused me and all doctors of being part of a fraternaty [*sic*], not of his order, that likes to inflict people with things." (Ex. 2, p. 5)

Claimant indicated he does not currently play soccer and has not done so in 20 years. Claimant clarified Dr. Cope asked him during evaluation if claimant played sports, to which claimant replied he frequently played when he was younger. (Ex. 21)

At the arranging of claimant's attorney, on June 22, 2015, claimant presented for independent medical evaluation (IME) with board certified neurologist, Irving Wolfe, D.O. (Ex. 6, p. 12) Dr. Wolfe performed a medical records review. (Ex. 6, pp. 1-5) Dr. Wolfe also interviewed claimant, who reported a history of standing with his right foot on a piece of cardboard on a pallet, when the cardboard slipped. Claimant indicated his right leg slipped and he felt a pop in his back, accompanied by a shooting pain from his back down his right leg. When given the option to leave work early that day, claimant did so. However, the pain worsened and claimant presented to the emergency room. (Ex. 6, p. 6)

Claimant reported suffering with continued symptoms he attributed to the August 29, 2014 alleged work injury. Claimant described daily sharp and throbbing low back pain with radiation into his right leg to the knee, with such symptoms occurring approximately 50 percent of his daytime hours. Claimant indicated a current pain level of 5 on a 10-point scale. Symptoms worsened with prolonged sitting, standing, walking, and sexual activity. Claimant also reported a lack of sleep and feelings of depression and anxiousness. (Ex. 6, p. 6)

Claimant admitted to suffering with some intermittent back pain in the past, but reported none was ongoing at the time of the alleged injury. Claimant denied any past right leg pain. He also admitted a history of psychiatric care. (Ex. 6, p. 7) Dr. Wolfe noted claimant currently worked for himself, marketing digitally downloadable products. Dr. Wolfe performed a physical examination. He noted claimant ambulated with use of a cane in his right hand, which claimant indicated was a personal preference. (Ex. 6, p. 8)

Following records review, interview, and examination, Dr. Wolfe assessed chronic low back pain secondary to a muscle strain/sprain with possible right-sided radiculopathy. Given claimant did not experience any low back pain or radiation to the right leg at that time of the alleged work injury, Dr. Wolfe opined claimant's current condition was directly causally related to the work injury of August 29, 2014. (Ex. 6, p. 9) Dr. Wolfe opined claimant had not achieved maximum medical improvement (MMI). He recommended further care, with that plan of treatment to be determined following a lumbar spine MRI. (Ex. 6, p. 10) Dr. Wolfe recommended restrictions of no repetitive bending at the waist, sitting and standing as tolerated, and a maximum lift of 15 to 20 pounds from floor-to-waist on an occasional basis and above waist level on an

infrequent basis. (Ex. 6, p. 11) In the event claimant was found to have achieved MMI, Dr. Wolfe opined claimant fell within DRE Lumbar Category II, warranting a five percent whole person impairment. (Ex. 6, p. 10)

On June 25, 2015, claimant returned to Dr. McGuire for evaluation. Dr. McGuire indicated he last evaluated claimant on November 20, 2014. Claimant informed Dr. McGuire he worked at KFC for a couple of months and then began performing online marketing. At the time of evaluation, claimant utilized a cane in his right hand. Dr. McGuire noted claimant presented with increased leg symptoms, specifically right leg pain with hamstring tightness and weakness of the right dorsiflexor. Dr. McGuire assessed a work injury with back aches and pains, and increased leg pain. He recommended x-rays and a lumbar MRI, given the presence of leg symptoms. (Ex. 1, p. 6)

Claimant testified he carries a cane purely for "fashion." (Claimant's testimony)

At the arranging of defendants, on July 10, 2015, claimant presented for IME with board certified orthopedic surgeon, Todd Harbach, M.D. (Ex. 7, p. 7) Dr. Harbach was provided medical records to review. (Ex. 7, p. 1) Claimant complained of low back pain following an injury at work stacking tires on August 29, 2014. At the time of the alleged injury, claimant reported he felt a pop in his back and developed pain in his low back and down his right leg. Claimant reported he attempted to continue working, but ultimately left work around lunchtime. (Ex. 7, p. 1) Claimant disclosed a history of back problems he related to lifting a television or sleeping on a poor mattress. (Ex. 7, pp. 2, 4)

At the time of evaluation, claimant complained of daily right low back pain with radiation down his right leg. Claimant reported a current pain level of 5 on a 10-point scale. He also reported worsening of his symptoms with walking, deep bending, and rising from a chair. (Ex. 7, p. 2) Dr. Harbach ordered and reviewed x-rays of the low back. (Ex. 7, p. 4)

Following records review, interview, and examination, Dr. Harbach assessed backache, chronic low back pain, lumbar degenerative disc disease, and back pain with radiation into the right leg to the knee. With respect to the issue of causation, Dr. Harbach expressed questions "as to the validity" of claimant's claim given claimant did not immediately report the injury. Dr. Harbach indicated claimant reported his pain following the alleged work injury was different than his prior back pain and persisted continuously since the alleged injury. (Ex. 7, p. 4) Relying upon claimant's statements, Dr. Harbach opined if claimant's symptoms were related to the alleged work injury, claimant would have sustained an exacerbation of a preexisting degenerative condition of the lumbar spine. (Ex. 7, p. 5)

Dr. Harbach indicated he recommended an MRI in order to delineate the pathology of claimant's lumbar spine. (Ex. 7, p. 6) However, given claimant's reports of

a plateaued condition since January 2015, Dr. Harbach opined claimant could have achieved MMI as of this time period. He opined claimant fell within DRE Lumbar Category II, with a permanent impairment of five percent whole person. Dr. Harbach did not recommend restrictions due to the "sound" condition of claimant's spine. He noted that any restrictions would be based solely on pain and accordingly, recommended a functional capacity evaluation to determine claimant's level of functioning. (Ex. 7, p. 5)

Claimant testified he continues to suffer with fluctuating pain in his back and right leg which varies based on activity levels. Claimant testified his pain is most severe with attempts to bend over and he has avoided lifting any heavy items since the alleged work injury. Claimant testified he desires additional medical treatment and "absolutely" wants to improve his physical condition. (Claimant's testimony)

In January 2015, claimant enrolled in online courses through Marshalltown Community College. Claimant majored in marketing and described himself as initially a full-time student. (Ex. 11, pp. 2-4) Claimant was not enrolled in classes during the fall semester of 2015, but testified he intended to resume his coursework during the spring semester of 2016. (Claimant's testimony) Claimant testified he desires to earn a marketing degree in order to assist in his self-employment efforts, as opposed to working for another marketing firm or company. (Ex. 11, pp. 7-8)

Claimant admits he possesses notable computer skills. (Claimant's testimony) Claimant maintains personal and professional online profiles. The record reveals claimant possesses two LinkedIn profiles. On one profile, claimant identifies himself as a self-employed business owner; the photograph provided on claimant's profile is not of the claimant. (Ex. 17, p. 1) In the other LinkedIn profile, claimant identified himself as self-employed and "[j]ust an average joe working fulltime from home." He noted skills of online advertising, HTML, SEO, social media, JavaScript, E-commerce, CSS, PHP, digital marketing, and social media marketing. (Ex. 17, p. 4) Claimant identified an interest in "[h]elping average joe's like myself find real products and services that will empower them to crush it online and obtain financial independence." (Ex. 17, p. 5)

In addition to the LinkedIn profiles, claimant maintains a Facebook profile and Pinterest page which both utilize a photograph of an individual who is not claimant. (Ex. 17, pp. 2, 12) Claimant maintains a YouTube page, again utilizing a photograph of another individual. The YouTube page contains miscellaneous video promotions, reviews, and referrals. (Ex. 17, pp. 6-11) Claimant also maintains a MeetMe page. (Ex. 17, p. 15) Additionally, Manta.com possesses a company profile for Home and Global which was authored by claimant. On the Manta.com page, claimant identified himself as a marketing consultant. (Ex. 17, p. 18) He indicated the following with respect to the professional services of Home and Global: "We provide top quality essential services to 23 countries helping the world stay up to date with affordable cutting edge technologies." (Ex. 17, p. 17)

Claimant testified the photographs he uses online are generally "representations" of himself, akin to positive affirmations of his view of himself as a "professional businessman." (Ex. 11, p. 8)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on August 29, 2014 which arose out of and in the course of his employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001);

Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant testified at deposition and evidentiary hearing that he suffered a work related injury on the morning of August 29, 2014 while at work at Advanced Wheels. Claimant provided consistent testimony regarding the occurrence of the work injury. Claimant's reports of injury to his medical providers and evaluators have been remarkably consistent, with the exception of one discrepancy with respect to which leg slipped on the cardboard. However, this discrepancy can easily be explained as a typographical error, given the consistency throughout the remainder of the evidentiary record. In short, claimant's statements regarding the occurrence of the alleged work injury have been consistent throughout the entire evidentiary record.

Despite this consistency, defendants argue claimant is not a credible witness. Defendants highlight claimant's history of feigned schizophrenia, his use of photographs of other individuals on social media sites, and his failure to immediately report the work injury as supportive facts for a determination claimant is not a credible witness. With consideration of these facts, the undersigned found claimant was a credible witness in this proceeding and throughout the pendency of his workers' compensation claim. The fact claimant did not immediately report his work injury is not fatal to his workers' compensation claim, as claimants have 90 days to report a work injury pursuant to Iowa Code section 85.23. Defendants acknowledge claimant timely reported his injury; furthermore, he reported his work injury on the next business day and the intervening medical report notes a consistent report of injury. The undersigned finds claimant is a credible witness.

Defendants' defense to this workers' compensation claim rests almost entirely in claimant's lack of credibility. However, the undersigned finds claimant is credible. The fact claimant did not immediately report his injury is not fatal to his claim; in my experience, it is not uncommon for injured workers to attempt to rest and see if a condition will resolve with time. Also not fatal is Mr. James' statement that he did not observe claimant perform any action which was out of the ordinary and could result in injury. Claimant was performing his typical work duties, work duties which were very heavy in nature, and sustained an injury. The fact Mr. James did not witness the injury personally is largely irrelevant.

The medical opinions in evidence all support a determination claimant sustained a work related injury on August 29, 2014. Dr. McGuire, on multiple occasions, causally related claimant's condition to the described work injury. Claimant denied a history of prior back problems to Dr. McGuire; however, the undersigned finds claimant's statement accurate. While the medical records reflect a few isolated incidents of back pain prior to the work injury, none of the events required ongoing medical care. There are no medical records indicating claimant received medical treatment of back

complaints immediately preceding the work injury. I also note that claimant was able to perform his heavy natured work at Advanced Wheels without difficulty for approximately three months prior to the work injury. Therefore, claimant's denial of prior back problems to Dr. McGuire is not inaccurate such as to warrant disregard of Dr. McGuire's causation opinions.

Claimant did inform Dr. Wolfe of intermittent prior back pain, but denied prior right leg symptoms and also denied any back symptoms at the time of the work injury. With this knowledge, Dr. Wolfe opined claimant's current condition was directly causally related to the injury of August 29, 2014. Claimant also disclosed a history of back problems to Dr. Harbach, notably related to sleeping on a poor mattress or lifting a television. While Dr. Harbach expressed some reservation with respect to the validity of claimant's claim given he did not immediately report the injury, Dr. Harbach opined that assuming the validity of claimant's reports, claimant had sustained an exacerbation of a preexisting degenerative condition of the lumbar spine.

Given the weight of the evidence and giving significant weight to the medical opinions of all three opining physicians, the undersigned finds claimant has proven by a preponderance of the evidence that he sustained an injury on August 29, 2014 arising out of and in the course of his employment.

The next issue for determination is whether the alleged injury is a cause of temporary disability. The next issue for determination is claimant's entitlement to temporary disability benefits from August 29, 2014 to the present. These issues will be considered together.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

As a result of the work related injury of August 29, 2014, claimant suffered with symptoms in his low back and right leg, for which he sought medical treatment.

Claimant initially received care with Dr. Wright on August 30, 2014; however, Dr. Wright did not restrict claimant's activities. It was not until claimant was evaluated by Dr. McGuire on October 9, 2014 that claimant's activities were limited. At that time, Dr. McGuire recommended removal from work for a two to three month period. Subsequently, on November 13, 2014, Dr. McGuire opined claimant was capable of working light duty, under restrictions. On November 20, 2014, Dr. McGuire altered claimant's work restrictions to allow for work a couple hours per day, with lifting of five to eight pounds, and minimal bending and twisting. Dr. McGuire never rescinded these work restrictions. At claimant's most recent evaluation with Dr. McGuire on June 25, 2015, Dr. McGuire recommended imaging of claimant's lumbar spine, specifically x-rays and a lumbar MRI.

In addition to the limited care provided by Dr. McGuire, claimant also underwent IMEs with Dr. Wolfe and Dr. Harbach. Dr. Wolfe opined claimant had not achieved MMI and recommended additional treatment, to begin with a lumbar spine MRI. He recommended restrictions of no repetitive bending at the waist, sitting and standing as tolerated, and a maximum lift of 15 to 20 pounds. Dr. Harbach also recommended an MRI of claimant's lumbar spine in order to delineate pathology. He, however, did not recommend any further treatment and opined claimant achieved MMI in January 2015 due to claimant's statements his condition had plateaued as of that time.

With respect to Dr. Harbach, claimant has received minimal treatment of his back complaints and has never undergone the imaging required to determine the etiology of claimant's symptoms. The undersigned believes it imprudent to declare an injured person maximally healed without providing the treating physician the benefit of diagnostic imaging necessary to identify the pathology of symptoms and to form the basis of an appropriate treatment plan. Therefore, I reject Dr. Harbach's opinion claimant has achieved MMI and adopt the opinions of Drs. McGuire and Wolfe.

I find claimant has proven by a preponderance of the evidence that the work injury of August 29, 2014 is a cause of temporary disability. I further find claimant has not achieved MMI and requires further medical evaluation and treatment. Therefore, it is determined claimant is entitled to temporary disability benefits beginning October 9, 2014, the date Dr. McGuire removed claimant from work. Claimant is entitled to temporary total disability benefits pursuant to Iowa Code section 85.33(1) from October 9, 2014 and continuing during the period claimant remains temporarily totally disabled.

Following the work injury, claimant did return to employment at KFC. Therefore, claimant's temporary total disability benefits are interrupted during the period claimant maintained gainful employment at KFC. However, in the event claimant's earnings at KFC were less than his stipulated average weekly wage of $289.29 at defendant-employer, claimant is entitled to temporary partial disability benefits pursuant to Iowa Code section 85.33(2). Claimant's temporary total disability benefits shall recommence at the conclusion of claimant's employment with KFC, as claimant remains

under work restrictions and it has not been demonstrated that claimant is capable of returning to substantially similar employment. The parties stipulated at the time of the work injury, claimant's gross average weekly wage was $289.29 and he was single and entitled to 1 exemption. The proper rate of compensation for temporary total disability benefits is therefore, $194.10.

Having determined claimant remains in a period of healing related to the work injury of August 29, 2014, the issues of causation as to permanent impairment, extent of claimant's industrial disability, and commencement date for permanent partial disability benefits are not ripe for consideration.

The next issue for determination is whether defendants are responsible for various 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 16, 1975).

When dealing with unauthorized care, to be entitled to payment, claimant must establish the care was rendered on a compensable claim. That being established, claimant must establish that the care provided on the compensable claim was both reasonable and the outcome more beneficial than the care offered by the defendants. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

By this decision, the undersigned determined claimant established he sustained a compensable work related injury on August 29, 2014. In treatment of this medical condition, claimant incurred medical expenses. Specifically, claimant requests defendants be held responsible for the following medical expenses: visits with Dr. McGuire on October 9, 2014; October 23, 2014 and November 20, 2014 (Ex. 8, pp. 1-3); the visit with Dr. Alexander on February 17, 2015 (Ex. 9, p. 1); costs associated with the Skiff emergency room visit on August 30, 2014 (Ex. 10, p. 1); and physical therapy sessions at Skiff during December 2014, January 2015, April 2015, June 2015 and July 2015. (Ex. 10, pp. 2-6)

The undersigned found claimant suffered a compensable injury. Defendants provided absolutely no medical treatment to claimant in relation to this work related injury. There is no indication the care received by claimant has been unreasonable. As defendants provided claimant no medical treatment and claimant has secured reasonable treatment on a compensable work related claim, it is determined defendants

are responsible for the medical expenses incurred and claimed by claimant in this proceeding.

The next issue for determination is whether claimant is entitled to an award of alternate medical care pursuant to Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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 1975).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

By this decision, the undersigned found claimant proved by a preponderance of the evidence that he sustained a work related injury on August 29, 2014. Defendants denied claimant's claim from its inception and provided claimant no medical treatment in regard to his claim. When presented with medical evidence relating claimant's claims to the alleged work injury, defendants persisted in the denial of claimant's claim. On these facts, it is determined defendants have abandoned care. Claimant has initiated a course of care with Dr. McGuire and seeks designation of Dr. McGuire as an authorized physician. Dr. McGuire's plan of care thus far has been reasonable and he and claimant have developed a physician-patient relationship. Therefore, it is determined claimant is entitled to an award of alternate medical care. Dr. McGuire is designated as claimant's authorized treating physician. Defendants are responsible for the medical costs associated with Dr. McGuire's care of claimant's work related condition and shall honor any referrals or orders made by Dr. McGuire.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

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.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

An employer has a continuing duty to investigate an employee's claim. See Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995) (a denial supportable at the time it is made may later lack a reasonable basis in light of subsequent information), abrogated on other grounds by Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004).

By this decision, the undersigned found claimant sustained a compensable work related injury on August 29, 2014, which entitled claimant to a running award of temporary disability benefits commencing October 9, 2014. Defendants have paid no such benefits. Claimant has demonstrated a denial in payment of benefits as required by section 86.13(4)(b)(1).

The burden therefore shifts to defendants to establish a probable cause or excuse for the denial in payment of benefits. In order to establish such an excuse, defendants must fulfill the requirements of section 86.13(4)(c). Defendants must establish the occurrence of a reasonable investigation into compensability of the claim, that the results of the investigation were the actual basis of the denial, and that the basis for the denial was contemporaneously conveyed to claimant. Defendants denied claimant's claim immediately, arguably based upon claimant's failure to report the injury immediately and lack of witnesses to the incident. Even if this purported investigation served as the basis for the denial of claimant's claim, there is no evidence any such information was conveyed to claimant until, at the earliest, October 24, 2014. This notification came via verbal communication between counsel of record.

On November 13, 2014, claimant provided defendants supportive medical evidence and requested reconsideration of the denial. Defendants provided no written basis for the denial of claimant's claim until January 20, 2015. On that date, defendants referenced the January 15, 2015 statement of Mr. James as the continued basis of the denial.

It is determined defendants first established a reasonable or probable cause or excuse for the denial of benefits on January 20, 2015. It was at this time that defendants fulfilled the requirements of section 86.13(4)(c), as there is evidence of a reasonable investigation, the results of the investigation were the basis of the denial, and the basis of the denial was contemporaneously conveyed. Although the undersigned did not agree with defendants' position regarding compensability, the issue was fairly debatable.

By this decision, I determined claimant was entitled to a running award of temporary total disability benefits commencing October 9, 2014. However, I also found claimant's temporary total disability benefits were properly interrupted during the period claimant had earnings from KFC. Claimant's earnings records from KFC are not in evidence and therefore, I am unable to determine claimant's monetary entitlement to temporary disability benefits during the period of October 9, 2014 through January 20, 2015. Given defendants' failure to promptly investigate claimant's claim through referral to a medical provider and defendants' failure to provide a written basis for denial of claimant's claim until nearly 5 months post-injury, the undersigned finds an award of 40 percent of the accrued temporary disability benefits is warranted. Claimant is therefore entitled to penalty benefits in the amount of 40 percent of the temporary disability benefits accrued during the period of October 9, 2014 through January 20, 2015.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical evaluation 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).

Claimant requests reimbursement for Dr. Wolfe's IME in the amount of $3,150.00. Dr. Wolfe performed his IME of claimant on June 22, 2015. As of that date, no employer-retained physician had evaluated claimant, let alone issued any form of opinion which could trigger claimant's right to an IME pursuant to Iowa Code

section 85.39. Accordingly, the undersigned must find claimant is not entitled to reimbursement of Dr. Wolfe's IME pursuant to Iowa Code section 85.39.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; copies of medical records in the amounts of $104.60 and $21.40; and for Dr. Wolfe's IME in the amount of $3,150.00. (Ex. 20, pp. 1-8) The cost of filing fee and the cost of obtaining copies of medical records are allowable costs and defendants are taxed with these costs in the amount of $226.00.

Claimant is not permitted to receive reimbursement for the full cost of Dr. Wolfe's IME as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Dr. Wolfe's bill itemization fails to identify what portion of the IME fee is attributable solely to report preparation. Accordingly, no portion of Dr. Wolfe's IME fee is taxed to defendants.

Defendants sought taxation of various costs against claimant; however, claimant has prevailed on the merits of his claim and no costs are taxed against claimant.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant temporary total disability benefits at the weekly rate of one hundred ninety-four and 10/100 dollars ($194.10) for the period beginning on October 9, 2014 and continuing through the period claimant remains entitled to temporary disability benefits pursuant to Iowa Code sections 85.33(1) or 85.34(1).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay penalty benefits in the amount of forty (40) percent of the temporary disability benefits accrued during the period of October 9, 2014 through January 20, 2015.

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 339 (Iowa 2008).

Dr. McGuire is designated as an authorized treating physician with respect to medical conditions causally related to the work injury of August 29, 2014.

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

Costs are taxed to defendants pursuant to rule 876 IAC 4.33 as set forth in the decision.

Signed and filed this 5th day of May, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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