BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT RALEY, Claimant, vs. SECURITAS SECURITY SERVICES OF USA, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5067169 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803.1, 2501

STATEMENT OF THE CASE

Robert Raley, claimant, filed a petition in arbitration seeking workers' compensation benefits against Securitas Security Services of USA (Securitas), as the employer, and Indemnity Insurance Company of North America, as the insurance carrier.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, a hearing occurred on September 17, 2020, via CourtCall. The case was considered fully submitted on October 2, 2020, upon the filing of briefs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record consists of Joint Exhibits 1 through 10, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through I. Robert and Susan Raley testified on claimant's behalf. Defendants called Heather Gass and Stacey Cooney.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's entitlement to permanent partial disability benefits is limited to functional disability pursuant to Iowa Code section 85.34(2)(v);
2. Whether claimant is entitled to payment of medical expenses;
3. 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:

Robert Raley is a 71-year-old individual, who sustained a stipulated low back injury as a result of his work as a supervisor for Securitas on February 23, 2018. Mr. Raley obtained a high school diploma in approximately 1967. (Hearing Transcript, pages 11-12) He did not immediately seek any additional education.

Claimant entered the workforce after graduating from high school. For approximately 30 years, Mr. Raley owned and operated Bob's Building Maintenance in Knoxville, Iowa. The company handled janitorial work, lawn care, and snow removal for commercial buildings. Mr. Raley testified that he was a hands-on owner, splitting his time between performing manual labor and handling the managerial aspects of the business. (Hr. Tr., p. 14)

Thereafter, claimant pursued an associate's degree in electronics from the National Education Center. (Hr. Tr., p. 12) After obtaining his degree, Mr. Raley started High Tech Computer, a computer maintenance company. (Hr. Tr., p. 14) After running High Tech Computer for approximately 15 years, Mr. Raley moved to Colorado, where he would find employment with a community college in the building maintenance department. He would subsequently work for an electronics company and the Transportation Security Administration (TSA). (Hr. Tr., p. 15) Mr. Raley retired from TSA in 2012 and moved back to Iowa. (Hr. Tr., p. 16) Mr. Raley briefly worked for Enterprise Rentals prior to working for the defendant employer. (Hr. Tr., p. 17) Claimant does not believe he could return to work for any of his past employers or fulfill the job duties of his past employment opportunities. (See Hr. Tr., pp. 44-45)

On the morning of February 23, 2018, Mr. Raley sustained an injury in the parking lot of the defendant employer. Upon exiting his personal vehicle, Mr. Raley slipped on a sheet of ice and fell, injuring his low back and right hip. (Hr. Tr., pp. 20-21) Mr. Raley developed radiating pain from his low back, into his right hip, and down to his foot. (Hr. Tr., p. 21) Mr. Raley subsequently reported the injury to his off-site administrative officer, Heather Gass. (Hr. Tr., p. 22) The defendant employer accepted the injury and directed care.

An MRI, dated April 24, 2018, revealed an L5-S1 disc herniation. (JE4) An EMG, dated July 24, 2018, showed right S1 radiculopathy, both acute and chronic. (JE6)

When conservative care failed to resolve his symptoms, defendants referred claimant to Todd Harbach, M.D. for a surgical consultation. (JE5) Dr. Harbach first evaluated Mr. Raley on June 1, 2018. (JE5, p. 1) Dr. Harbach ultimately recommended a micro-decompression at L5-S1, and S1-S2, on the right. (JE5, p. 16) Unfortunately, claimant decided to decline the recommended surgical intervention because of a pre-existing, blood clotting disorder. (See JE5, p. 16)

Dr. Harbach placed claimant at maximum medical improvement (MMI) as of September 14, 2018. (JE5, p. 20) He opined that claimant had sustained 10 percent whole person impairment as a result of the low back injury. (Exhibit A) In terms of restrictions, Dr. Harbach recommended claimant obtain a functional capacity evaluation (FCE). (JE5, p. 20) Dr. Harbach released claimant to return to work without restrictions; however, he noted his belief claimant would have issues with prolonged standing and walking. (JE5, p. 20)

The July 9, 2019, FCE report placed claimant's functional capabilities in the sedentary category of physical demand. (Ex. 3, p. 8) The report also recommended that claimant be able to change positions between sitting, standing, and walking as needed due to his decreased strength and endurance. (Id.)

After being released by Dr. Harbach, claimant sought relief of his symptoms through his personal chiropractor, Dale Crain, D.C. (See JE7) A May 21, 2019, record provides claimant was finding it more difficult to work and perform his daily activities without increasing his already constant low back pain. (JE7, p. 1) In June of 2019, claimant reported he was having trouble with movement and that it was a struggle to get through work. (JE7, p. 4)

Mr. Raley returned to work within days of the injury date. (Hr. Tr., p. 33) Upon his return, the defendant employer provided him with a better chair to sit in and transportation services to and from various buildings. (Hr. Tr., p. 34) Claimant continued working for the employer through the date of the arbitration hearing. However, a more accurate description would be that claimant remained employed by the defendant employer on the date of the arbitration hearing. Claimant last physically worked for the defendant employer in February 2020. Since then, claimant has experienced a series of unfortunate events.

Claimant was admitted to the hospital on February 9, 2020, for gastrointestinal issues. (See Hr. Tr., p. 61) He was initially released on February 10, 2020; however, he was back in the hospital by February 14, 2020, and remained there until February 18, 2020. (See Hr. Tr., p. 61) Additionally, while off work for the gastrointestinal issue, claimant suffered a stroke. Thereafter, claimant underwent an unspecified heart procedure. (Hr. Tr., p. 38) As of the date of the arbitration hearing, claimant was still recovering from his stroke. (Hr. Tr., p. 54)

At some point in time after suffering his gastrointestinal issues, claimant filed for leave under the Family Medical Leave Act (FMLA). (Hr. Tr., pp. 43, 66) To date, claimant has not received any correspondence from the defendant employer indicating

he has exhausted his leave under FMLA; this, despite the fact he has not worked since February 2020. (Hr. Tr., pp. 43-44)

With respect to his current medical status, claimant asserts he has been released to return to part-time work. More specifically, claimant asserts that his neurologist recommended that if he returns to work, he should limit his workday to four hours. (See Hr. Tr., p. 41) That being said, because claimant has a number of personal health conditions, it has also been recommended that he quarantine to avoid exposure to COVID-19. (See Hr. Tr., p. 69)

Mr. and Mrs. Raley testified they reached out to Stacey Cooney, a district manager for Securitas, to inquire as to whether Securitas had any part-time work available. (Hr. Tr., pp. 39-40, 62, 65) According to claimant, Ms. Cooney told him there were part-time positions available, but not in claimant's security department. (Hr. Tr., p. 40) Moreover, Ms. Cooney told claimant that security supervisors were now being scheduled to work 12-hour shifts due to COVID-19. (See Hr. Tr., p. 65) Claimant testified he has not received an offer of part-time work since this conversation occurred. (Hr. Tr., p. 40)

According to claimant, when the defendant employer did not offer to return him to part-time work, his daughter filed for unemployment benefits on his behalf. (Hr. Tr., pp. 41, 62) Mrs. Raley testified that an unemployment hearing occurred, and that the matter is currently on appeal. (Hr. Tr., pp. 62-63) Claimant's unemployment records were not offered into the evidentiary record.

Heather Gass, a security team manager with Securitas, testified on defendants' behalf. (See Hr. Tr., p. 71) Ms. Gass was claimant's direct supervisor on the date of injury. (Hr. Tr., p. 73) She operated as claimant's supervisor until June 2020 when she received a promotion. Ms. Gass confirmed claimant continued to work his same job, performing the same job duties, and earning the same or greater wages following the date of injury. (Hr. Tr., p. 74) Ms. Gass testified that claimant appeared to be in pain when he returned to work after the date of injury. She further testified that he would report his pain complaints to her. (Hr. Tr., p. 77)

The aforementioned Stacey Cooney also testified on defendants' behalf. (See Hr. Tr., p. 81) Ms. Cooney has not directly supervised claimant; however, she is the district manager of the Microsoft facility where claimant would theoretically be working at this point in time but for his personal health conditions. (Hr. Tr., p. 83) Ms. Cooney testified that claimant is considered an active employee of Securitas, and he is eligible to return to his same position if/when he is released to return to work from his personal health issues. (Hr. Tr., p. 84)

The parties submit two primary disputed issues in this case. The first is the nature and extent of Mr. Raley's entitlement to permanent disability benefits. The second significant disputed issue is claimant's entitlement to reimbursement for medical expenses.

With respect to the nature and extent of Mr. Raley's entitlement to permanent disability benefits, the parties are in agreement that claimant sustained an unscheduled injury to the low back on February 23, 2018. (Hearing Report)

Claimant sought an independent medical examination, performed by Sunil Bansal, M.D., on May 28, 2019. (Ex. 1, p. 1) After physically examining claimant and reviewing his medical records, Dr. Bansal diagnosed claimant with an aggravation of lumbar degenerative disc disease and an L5-S1 disc herniation. (Ex. 1, p. 8) Dr. Bansal agreed with the September 14, 2018, MMI date previously assigned by Dr. Harbach. (Ex. 1, p. 10) Due to claimant's radicular complaints, loss of range of motion, and guarding, Dr. Bansal placed claimant in DRE Lumbar Category II and assigned 10 percent whole person impairment. (Id.) For permanent restrictions, Dr. Bansal recommended no lifting greater than 20 pounds, no frequent bending or twisting, and no prolonged sitting or standing greater than 30 minutes at a time. (Id.)

Drs. Bansal and Harbach reached the same whole person impairment rating of 10 percent. The impairment rating is not challenged by any record in evidence. Therefore, I accept the mutually agreed upon permanent impairment rating and find claimant sustained 10 percent whole person impairment as a result of his February 23, 2018, work injury.

Dr. Bansal's recommendations for permanent restrictions are similar to the recommendations contained in the July 2019, WorkWell FCE report. Dr. Bansal and Dr. Harbach appear to be in agreement that claimant requires some form of restriction on walking, sitting, and/or standing. (Ex. 1, p. 10; JE5, p. 20) The restrictions outlined by Dr. Bansal appear to accurately reflect claimant's functional abilities.

As previously discussed, Mr. Raley returned to work for the defendant employer following the work injury. Despite his ongoing complaints of pain, Mr. Raley worked his normal, full duty position with little accommodations from February 2018, until February 2020. When he initially returned to work, Mr. Raley received the same rate of pay he received prior to the date of injury. He would subsequently receive a raise in October 2018 and October 2019.

Claimant has demonstrated the ability to continue working for the defendant employer. Claimant technically returned to his pre-injury position; however, there is some question as to whether or not claimant would be able to meet all of the essential functions of the security supervisor position if permanent restrictions were adopted. The issue is complicated by the overly broad language used in the defendant employer's job description. It is clear, however, that claimant would not be able to meet at least some of the essential functions of the security supervisor position if any restrictions were adopted. For instance, the demands of a security supervisor include, "Standing for hours at a time" and "Sitting for hours at a time." (Ex. B, p. 2) Again, even Dr. Harbach expressed his concern for claimant's abilities in this regard. (JE5, p. 20)

Moreover, it is at least questionable whether claimant would physically be able to return to work for the defendant employer at this time given the combination of his work

restrictions and his personal health conditions. For example, as a result of his stroke, claimant now utilizes a cane, which further impedes his ability to stand for hours at a time. (Hr. Tr., p. 42) While claimant's subsequent personal conditions are not particularly relevant to claimant's permanent impairment, his current inability to return to work is problematic when assessing whether claimant's recovery is limited to his functional impairment or whether claimant is entitled to an assessment of industrial disability.

CONCLUSIONS OF LAW

The main issue submitted by the parties is whether claimant's claim for permanent disability benefits is limited to the functional, whole person impairment rating, or, whether claimant is entitled to an industrial disability analysis at this point in time. At the center of this discussion are the 2017 amendments to Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) provides, in part:

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

It is undisputed that following the February 23, 2018, work injury, claimant returned to work for the defendant employer and received the same or greater earnings than what he was receiving at the time of the injury.

Iowa Code section 85.34(2)(v) continues:

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Both parties cite to the recent appeal decision of Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec. July 30, 2020). Having written the arbitration decision, the undersigned is intimately familiar with the facts of Martinez.

Raley broadly asserts that the new provisions contained in Iowa Code section 85.34(2)(v) do not preclude an assessment of industrial disability in this case because claimant was not physically working for the defendant employer at the time of hearing. In this respect, Raley asserts the new provisions are only applicable when: (1) a claimant is still working for the defendant employer at the same or higher wages; or (2) where a claimant has been terminated. Thus, since the new provisions do not specifically address whether they are to apply when a claimant is on medical leave, the new provisions should not preclude an industrial disability assessment in this matter.

Conversely, Securitas argues Iowa Code section 85.34(2)(v) requires termination by the employer before an injured worker can seek industrial disability benefits. Defendants further assert that claimant's reliance on Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec. July 30, 2020), is misplaced because unlike Raley, the claimant in Martinez had been terminated. In other words, defendants assert termination of the employment relationship is a condition precedent to receiving industrial disability benefits.

In Martinez, the claimant sustained injuries to his bilateral lower extremities and his right wrist. The commissioner concluded that because three scheduled member losses were not encompassed under Iowa Code section 85.34(2)(t), Mr. Martinez was entitled to benefits under Iowa Code section 85.34(2)(v). After a period of recovery, Mr. Martinez returned to work for the defendant employer. After approximately one month of light-duty work, claimant returned to his full-duty position. A few months thereafter, Mr. Martinez voluntarily resigned and secured alternative employment with a different employer. When compared to claimant's pre-injury earnings, Mr. Martinez received the same or greater earnings with his new employer. It was argued that because Mr. Martinez returned to work for which he received the same or greater salary, regardless of the fact it was with a different employer, the new provisions of Iowa Code section 85.34(2)(v) applied and claimant's recovery was limited to the functional impairment resulting from the work injury.

In analyzing Iowa Code section 85.34(2)(v), the commissioner held,

> [W]hen the two new provisions . . . are read together, as they are set forth in the statute, it appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer.

(Martinez, p. 5) The commissioner determined that the new provisions do not apply when a claimant voluntarily separates his or her employment with the defendant-employer and then initiates employment with a new employer at the same or greater wages than the claimant was earning at the time of the injury. (Id.) In other words, the new provisions limit an injured workers' benefits to the functional impairment sustained as a result of the injury, if that claimant returns to work for the same employer and earns the same or greater wages than he or she did on the date of injury. In such a scenario,

the injured worker is not entitled to an assessment of his or her loss of earning capacity until their employment relationship is terminated with the original employer.

The practical application of the holdings of Martinez were discussed in a recent update to the Iowa Practice Series, Workers' Compensation treatise:

> When an employee does not return to work for the same employer that the employee was working for at the [time] of injury, the employee is allowed industrial disability for a whole-body injury. The only situation where the limitation on the employee's allowance of an industrial disability evaluation is when the same employer that the employee was working for when injured offers the employee work at the same or higher wages and the employee accepts that work. The employee can be offered the work, decline it, and is allowed industrial disability under the law.

Iowa Practice, Workers' Compensation § 13:6 (2021) It should be noted that the second sentence of the above summation is not entirely accurate. It would be more accurate to say the limitation applies when the same employer that the employee was working for when injured offers the employee work at the same or higher wages, the employee accepts that work, and the employee remains employed by the employer on the date of the evidentiary hearing. In such a scenario, an employee's permanent disability benefits are limited to the functional loss. This is an important clarification as the claimant in Martinez was offered work at the same or higher wages and accepted said offer; however, he later terminated his employment with the employer prior to the date of the evidentiary hearing.

Martinez implies, but does not specifically state, that the phrase "termination from employment by that employer" is a broad standard to be interpreted liberally. The standard is not limited to situations in which the employer terminates, or fires, the injured worker. Defendants appear to acknowledge the same in their post-hearing brief. (Post-hearing Brief, p. 5) ("The Martinez decision involved a claimant that had been terminated." Again, Martinez voluntarily terminated the employment relationship) The alternative, more narrow interpretation of the provisions would grant employers the ability to hold industrial disability benefits hostage, and would ultimately encourage injured workers to be insubordinate if they wanted to seek industrial disability benefits.

The matter at hand highlights one of the reasons why "termination" must be broadly interpreted to apply to both voluntary termination by the injured worker and involuntary termination by the employer. If "termination" was not broadly interpreted, claimants unable to return to work due to personal health conditions, like Raley, would have little to no recourse if their employer indefinitely classified them as "active employees" in the hopes they could one day return. In such a scenario, the injured worker is an "active employee" in name only. Surely this was not a goal of the legislators in crafting Iowa Code section 85.34(2)(v).

By broadly interpreting "termination" to mean both voluntary and involuntary terminations, injured workers still retain some control over their entitlement to industrial disability benefits. While it is unfortunate that an unexpected consequence of this new legislation essentially forces injured workers to choose between continued employment with the same employer or triggering entitlement to industrial disability benefits, an alternative interpretation of "termination" would leave them powerless in their efforts to be fully compensated for workplace injuries.

Claimant asserts the plain language of the 2017 amendments does not specifically address the factual situation presented in the matter at hand. Claimant asserts the new provisions are applicable to a situation where a claimant is still working at the same or higher wages or where a claimant has been terminated. In this regard, claimant asserts he is not currently working at the same or higher wages, and he has not been terminated, so the provisions do not apply to limit his benefits to functional loss.

Claimant's argument presents the question of whether events that occur in the time period between returning to work for the same or greater wages, and termination, can effectively remove an injured worker from the functional analysis and trigger entitlement to benefits using the industrial disability analysis.

As previously discussed, Martinez appears to define entry and exit points for the quasi-holding period where an injured worker's recovery is limited to the functional, whole person impairment rating. An injured worker enters the holding period when they return to work for the same employer and earn the same or greater wages, and they exit the holding period when their employment relationship with the employer is terminated.

Claimant urges a very literal interpretation of the two provisions, i.e, the provisions limit an injured worker's benefits if, and only if, the injured worker is actively working for the defendant employer and earning the same or greater wages at the time of hearing.

On one hand, claimant's interpretation would frustrate the purpose of the new provisions and create uncertainty in their application. For instance, claimant has repeatedly testified that if he is released to return to work by his neurologist, he intends to return to work for the defendant employer. If he follows through on his statements, and he is returned to work earning the same or greater wages with the defendant employer, he would not be entitled to industrial disability benefits at that point in time.

On the other hand, a bright line rule providing that events which occur in the time period between returning to work for the same or greater wages, and termination, cannot and do not remove an injured worker from the functional analysis and trigger entitlement to benefits using the industrial disability analysis, creates its own set of problems. For instance, the new provisions do not provide how long the injured worker must receive the same or greater wages. If the employer subsequently decreases the injured worker's wages, or transfers the injured worker to a part-time role, is the injured workers' only recourse to terminate their employment? This, and several other issues

presented by such a poorly-worded piece of legislation will undoubtedly have to be addressed in subsequent agency decisions.

The holding of Martinez is relatively straightforward. If an injured worker returns to work for the same employer and earns the same or greater wages than he or she did on the date of injury, the injured worker's entitlement to permanent disability benefits is limited to the functional loss unless or until the injured workers' employment relationship is terminated by either the injured worker or the employer.

While exceptions to the rule will undoubtedly develop through agency decisions, I am not convinced the facts of this case necessitate the creation of such an exception in this instance. This is largely due to claimant's belief and desire to return to work for the defendant employer if and when he is released for his personal conditions.

Admittedly, I find it unlikely claimant will be able to return to his security supervisor position in a full-time, full duty capacity. The undersigned is relatively concerned whether claimant will be able to return to work for the defendant employer in any capacity given his personal health conditions. Nevertheless, claimant has expressed a clear preference for his desire to eventually return to work if and when he is medically cleared. He has consistently testified he considers himself an employee of the defendant employer. The parties are in agreement that claimant has not been terminated. This is problematic for claimant's argument, as termination – regardless of whether it is voluntary or involuntary – is a key component of the Martinez decision.

Finding claimant is entitled to industrial disability benefits at this time would require the undersigned to find that claimant's employment has been terminated. As previously discussed, such a finding would not be difficult to make under facts similar to this case. If claimant had no intention of returning to work for the defendant employer, or if the evidentiary record contained a medical opinion providing it unlikely claimant would be able to return to work given his personal conditions, it is likely the undersigned would reach a different conclusion.

While it is not particularly in the interests of judicial economy[1], a finding that the new provisions apply in the matter at hand does not encroach on either party's rights. If claimant is unable to return to work due to his personal issues, his employment with the defendant employer will be said to have terminated and he will be able to seek review-reopening. If claimant is able to return to work in some capacity, defendants will still have the opportunity to bring him back at equal or greater wages than he was earning on the date of injury. To rule otherwise would leave open the possibility of claimant returning to work, with the same employer, earning the same or greater earnings, and receiving an award of industrial disability benefits prior to termination.

[1] Chapter 85 encourages employers to compensate employees who receive workplace injuries promptly and provides a forum for efficient resolution of workplace-injury claims with minimal litigation. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015); Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921).

As previously alluded to, the undersigned believes a strong argument exists that claimant's employment relationship with the defendant employer has been effectively terminated; however, such a finding would defy claimant's own testimony and belief that he is still an employee of the defendant employer and he intends to return to work for the same once he is medically cleared to do so. For these reasons, I find claimant's entitlement to permanent partial disability benefits – at this time – is limited to the functional loss he has sustained as a result of his work injury.

Having weighed the competing medical evidence, and after accepting the impairment rating of both Dr. Harbach and Dr. Bansal, I found Mr. Raley proved a functional loss equivalent to 10 percent whole person impairment as a result of the February 23, 2018, work injury. Iowa Code section 85.34(2)(x) prohibits consideration of lay testimony or the use of agency expertise in assessing whether the impairment rating assigned is a reasonable estimate of the functional disability sustained by claimant. "In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A." Iowa Code section 85.34(2)(x). As such, I conclude claimant is entitled to a permanent partial disability award equivalent to 10 percent of the body as a whole.

Claimant is entitled to a proportional award equivalent to 10 percent of 500 weeks. Iowa Code section 85.34(2)(v). Therefore, I conclude claimant is entitled to an award of 50 weeks of permanent partial disability benefits. These benefits shall commence on the stipulated date of September 14, 2018. (Hearing Report)

At hearing, claimant requested an order providing defendants are responsible for the various medical expenses contained in Exhibit 5. In his post-hearing brief, claimant withdrew his request that defendants pay for the medical expenses associated with Crain Chiropractic and Mercy Indianola Clinic. However, claimant asserts defendants should be held responsible for a Mercy South Clinic bill of $224.00. The bill is for treatment claimant received on Sunday, February 25, 2018, just two days after the date of injury. Claimant acknowledges that the defendant employer did not direct him to the Mercy South Clinic for medical treatment related to the work injury. Claimant implies he did not seek authorization for medical treatment from defendants because he sought the medical treatment over the weekend.

Defendants were aware of claimant's injury as of Friday, February 23, 2018. On that date, the company nurse hotline recommended treatment in the form of using ice and heat packs over the weekend. (See Hr. Tr., p. 22) It does not appear the nurse provided any instructions for claimant to follow should he require additional medical treatment over the upcoming weekend.

Unfortunately, claimant's pain did not improve and he sought care with the urgent care clinic at Mercy South to rule out any broken bones within his hip. (Hr. Tr., p. 24)

Claimant received medications and a referral for an x-ray of his hip. (JE2, p. 4) The February 25, 2018, medical record is consistent with all other medical records in evidence. The on-duty physician prescribed medications similar to those eventually prescribed by claimant's authorized treating physician.

There does not appear to be a dispute that the care claimant received is causally related to the February 23, 2018, work injury. There does not appear to be a dispute that the medication and diagnostic imaging ordered was reasonable and necessary to diagnose and treat claimant's work-related condition. Claimant was not acting in defiance of the defendant employer's choice of care when he sought urgent medical treatment through Mercy South on February 25, 2018. The employer's statutory burden to monitor an injured employee's care is not an onerous one. Defendants were aware of the injury on the date of injury. Defendants knew or should have known claimant was going to be off work for the next two days. There is no evidence defendants provided claimant with any instructions to follow should his condition worsen over the weekend.

An employee generally may recover medical expenses incurred in seeking unauthorized care upon proving by a preponderance of the evidence the care was reasonable and beneficial under the totality of the circumstances. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 202–08 (Iowa 2010). I find claimant has carried his burden of proving the care was reasonable and beneficial under the totality of the circumstances. Defendants shall reimburse claimant or communicate with claimant's insurance company directly to cover the costs associated with the February 25, 2018, medical appointment.

Claimant also seeks an order requiring defendants to reimburse his functional capacity evaluation (FCE) fees pursuant to Iowa Code section 85.27. Following his final examination of claimant on September 14, 2018, claimant's treating physician opined, "I recommend the patient receive an [*sic*] functional capacity evaluation to determine his limitations." (JE5, p. 20) An FCE was requested by a treating or evaluating physician. The fees associated with such an FCE report can be assessed as a medical expense under Iowa Code section 85.27 in this situation.

The FCE fees could also be assessed as a cost under rule 4.33(6), regardless of whether the FCE was requested by an authorized treating physician. See Jasper v. Nordstrom, Inc., File No. 5052714 (App. October 7, 2020) (reh'g denied October 16, 2020)

The phrase, "the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report" was inaccurately attributed to rule 4.33 by a deputy commissioner in Mundt v. Nash-Finch Company, File No. 5031874. (Arb. May 10, 2012). Prior to Mundt, the phrase, "the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report" was utilized solely to assess whether an injured worker was entitled to the reimbursement of an FCE under Iowa Code section 85.27, not under Iowa Administrative Code rule 876-4.33.

Historically, injured workers have asserted entitlement to reimbursement of an FCE based on Iowa Code section 85.27, Iowa Code section 85.39, and Iowa Administrative Rule 4.33.

The practice of assessing FCEs as a medical cost under Iowa Code section 85.27 dates back to at least 1999. See Abbott v. Claimatronics, Inc., File No. 1169129 (Arb. Nov. 18, 1999) ("That FCE was not obtained for any medical purpose, but for this litigation. It is not compensable under section 85.27"); Juarez v. National Roofing of Sioux City, Inc., File Nos. 1227582, 1282184 (Arb. April 18, 2002) ("...claims reimbursement for a functional capacity evaluation under Iowa Code section 85.27 [...] These expenses, however, had nothing to do with treating the injured worker. The FCE was not ordered by any physician"); Garner v. ADM/Growmark, File No. 1201659 (Arb. Aug. 2, 2001)

In Garner, the deputy commissioner ordered the defendant to reimburse claimant the fees associated with an FCE because the FCE was recommended by a medical provider. The deputy provided,

> Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant seeks reimbursement for the $650 expended for the functional capacities evaluation (FCE). I found that due to the recommendation of Dr. Herrera, this constituted reasonable and necessary treatment. Therefore, the costs of the FCE will be awarded.

Importantly, several of the decisions that addressed whether FCEs were reimbursable under Iowa Code section 85.27 did not address whether FCE reports were reimbursable as a practitioner's report under rule 4.33. See Abbott v. Climatronics, Inc., File No. 1169129 (Arb. Nov. 18, 1999); Juarez v. National Roofing of Sioux City, Inc., File Nos. 1227582, 1282184 (Arb. April 18, 2002)

A review of agency precedent reveals that the shift from requesting reimbursement under Iowa Code section 85.27 to Iowa Administrative Code rule 876-4.33(6) occurred in approximately 2005. One of the first decisions to provide any significant analysis on the issue was Bartz v. City of Johnston, File No. 5013521 (Arb. Jan. 10, 2005) In Bartz, the deputy commissioner explained:

> The only section of rule 876 IAC 4.33 that potentially applies to this cost is subsection six, which allows taxation of "the reasonable costs of obtaining no more than two doctors' or practitioner's reports." The claimant is, in effect, arguing that he is not only entitled to the report of a practitioner, but also the costs associated with procuring that report, which, in this case, is a Functional Capacity Evaluation. The agency, however, has for many years consistently held that the costs of practitioner reports are limited to $150.00 each. The rationale is that $150.00 is all that would be allowed as an expert witness fee had the expert's views been obtained in an oral deposition under the costs provisions of Iowa Code sections 622.69 and

> 622.72 rather than in written form. Schmidt v. Cardinal Construction, File No. 947339 (App. July 22, 1999) [...] The only taxable costs to which the claimant is entitled are the filing fee of $65.00; service costs of $8.84; and a practitioner's report fee of $150.00.

Several arbitration decisions between Bartz and Mundt concluded that FCE reports were reimbursable under rule 4.33(6), however, the reimbursable amount was limited to $150.00 pursuant to Iowa Code section 622.69 and 622.72. (See Pratt v. Johnsrud Transport, File No. 5029328 (Arb. May 24, 2011); House v. Mike Brooks, Inc., File No. 5032188 (Arb. May 16, 2011); Bradley v. Des Moines Public Schools, File Nos. 5028813, 5028814 (Arb. Oct. 20, 2010); Garcia-Diaz, Swift Pork Co., File No. 5026201 (Arb. July 21, 2009); Rose v. Menards, File No. 5024837 (Arb. Feb. 20, 2009) (affirmed on appeal on October 29, 2009); Peters v. Bridgestone/Firestone, File Nos. 5021402, 5021403 (Arb. Mar. 20, 2008); Henry v. UNOVA, Inc., File No. 5013702 (Arb. May 23, 2007); Dizdarevic v. Kennedy & Company, Inc., File No. 5018387 (Arb. April 2007); Avdic v. Genesis Visiting Nurses, File No. 5009741 (Arb. March 30, 2006); Fitch v. Five Star Quality Care, File No. 1318537 (R.R. Jan. 9, 2006); Stewart v. Kraft Foods, Inc., File Nos. 5012581, 5012582 (Arb. Aug. 3, 2005); Bartz v. City of Johnston, File No. 5013521 (Arb. Jan. 10, 2005) Whether or not an authorized or treating physician recommended the FCE was not a factor considered by the agency when determining an injured worker's entitlement to reimbursement under rule 4.33.

To avoid any confusion, it should be noted that previous agency decisions limiting recovery of the costs of practitioner reports to $150.00 pursuant to our rule 876 IAC 4.33 are no longer valid. The reasonable fees charged to obtain such reports are now fully reimbursable. John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa Ct. App. 2011)

Subsequent to the Mundt decision in 2012, this agency continued to recognize that an FCE report can be awarded as a cost under rule 4.33. See Hernandez v. Holland Contracting Corp., File No. 5034658 (Arb. March 11, 2013); Perez v. Pine Ridge Farms, File Nos. 5037728-5037729 (Arb. Dec. November 27, 2012); Murueta v. Brookdale Senior Living, File No. 5035620 (Arb. Dec. August 29, 2012) Several decisions continued to apply the standard expressed in Mundt (See Olson v. Brooks Park Resorts, LLC, File Nos. 5043565, 5043574 (Arb. Aug. 12, 2014); Bass v. Vieth Construction Corp., File No. 5044438 (Arb. Jan. 26, 2015); Mlady v. Searle Petroleum, Inc., File No. 5024091 (Appeal Decision Feb. 17, 2016) while other decisions made no mention of the recommendation requirement when awarding reimbursement (See Fuller v. Iowa Protein Solutions, File Nos. 5036579, 5036580 (Arb. Sept. 13, 2013); Smith v. Iowa Home Care, LLC, File No. 5041109 (Arb. Oct. 15, 2013); Ramer v. Kryger Glass, File No. 5039788 (Arb. Feb. 18, 2014); Green v. Jacobson Staffing Co., File No. 5040443 (Appeal Decision July 15, 2014)) This noted division in how to address reimbursement of an FCE report has remained relatively consistent.

Of the discordant outcomes, I find reimbursement of an FCE report pursuant to 4.33(6) does not require that the underlying FCE stem from the recommendation of an authorized or treating provider. Such a finding is consistent with the plain language of

Iowa Administrative Rule 876-4.33 and supported by the commissioner's ruling on defendants' motion for rehearing in Jasper v. Nordstrom, Inc., File No. 5052714 (App. October 7, 2020) (reh'g denied October 16, 2020).

Rule 4.33 sets forth the costs that can be taxed by either the commissioner or a deputy commissioner. The Iowa Court of Appeals has stated that Iowa Administrative Code rule 976-4.33(6) is clear and unambiguous. John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa Ct. App. 2011) The rule states:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Based on the plain language of the rule, it does not appear that a recommendation from an authorized or treating physician is a prerequisite to reimbursement under subsection six. Such a finding is consistent with how other reports from doctors and practitioners are handled. Certainly, an injured worker is not required to show an authorized or treating physician has recommended that he or she pursue their own independent medical examination to prove entitlement to reimbursement of an IME report. Similarly, vocational reports are routinely reimbursed without a showing that an authorized or treating physician recommended the same. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019); Simmer v Menards, File No 5041139 (App. April 29, 2020). It is inconceivable that rule 4.33(6) would require this agency to handle FCE reports differently than IME reports and vocational reports when assessing costs. It logically follows that a recommendation from an authorized or treating physician is not a prerequisite to reimbursement of a report under rule 4.33(6).

Nevertheless, because the FCE was requested by an authorized treating physician, I award the fees associated with the FCE report pursuant to Iowa Code section 85.27. Should an appellate court disagree with my finding that the FCE was recommended by an authorized treating physician, I find the fees associated with the FCE report would also be reimbursable as a cost under 876 IAC 4.33(6).

Lastly, claimant seeks an assessment of costs. Claimant seeks $100.00 for his filing fee, which I conclude is reasonable and taxable pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits commencing on September 24, 2018, at the weekly rate of four hundred fifty-nine and 90/100 dollars ($459.90).

Defendants shall receive credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

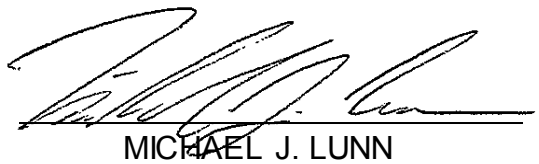
Defendants shall pay the prior medical expenses from Mercy South submitted by claimant in Exhibit 5.

Defendants shall pay the costs associated with the July 9, 2019, FCE of nine hundred and 00/100 dollars ($900.00) pursuant to Iowa Code section 85.27

Defendants shall pay costs of one hundred and 00/100 dollars ($100.00).

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 26th day of March, 2021.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Fredd J. Haas (via WCES)

Caroline Westerhold (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.