BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS PINCKNEY, Claimant, vs. MILLS FLEET FARM, Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5066786 ARBITRATION DECISION Head Note Nos.: 1402.80, 1801.1, 1803 2206, 2502, 2907

STATEMENT OF THE CASE

Claimant, Dennis Pinckney, filed a petition in arbitration for workers' compensation benefits against Mills Fleet Farm, Inc., defendant employer, and Sentinel Insurance Company, defendant insurer. The undersigned heard this case on December 10, 2019, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 6, and Defendants' Exhibits A through F. Claimant testified on his own behalf. Lisa Reitan, a representative from the defendant employer, also provided testimony. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on January 28, 2020, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution in File No. 5066786:

1. Whether the stipulated injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability benefits, if any;

2. Whether the stipulated injury caused permanent disability and, if so, the nature and extent of claimant's entitlement to permanent disability benefits, if any;

3. Whether claimant is entitled to reimbursement for the medical expenses in Exhibit 2, and, if awarded, the reasonableness of the independent medical examination (IME) fees;

4. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39

5. Whether claimant is entitled to an award of penalty benefits under Iowa Code section 86.13; and

6. Costs.

FINDINGS OF FACT

Dennis Pinckney was born in May 1954, making him 65 years old on the date of the evidentiary hearing. (Hearing Transcript, page 8) Mr. Pinckney did not graduate from high school; however, he did obtain a High School Equivalency Certificate, or GED. (Hr. Tr., p. 36) Claimant's employment history largely consists of work as a delivery driver for various companies. (Exhibit 3, p. 11) Claimant worked as a driver for Victoria Cleaners from January 2007 to January 2015. (Ex. B, p. 1) In this role, claimant would drive to various locations and pick-up or deliver items. At hearing, claimant testified he left Victoria Cleaners because the job required him to work too many hours of overtime. (Hr. Tr., p. 38) A medical record from a prior workers' compensation claim reports claimant left Victoria Cleaners because he was unable to pick up certain items due to his low back symptoms. (See Ex. E, p. 1) Claimant subsequently worked a few months as a part-time delivery driver for Pizza Hut. (Hr. Tr., p. 39) He would later accept a position with the defendant employer.

Pinckney began working as a part-time service technician in the automotive department for the defendant employer on May 15, 2015. (Hr. Tr., p. 9) He transitioned into full-time work approximately six months thereafter. (Hr. Tr., p. 11) Claimant's job duties consisted of servicing automobiles, which included changing oil, adjusting alignments, installing various auto parts, and repairing various auto parts such as tires, shocks, and exhausts. (Hr. Tr., p. 9)

On August 24, 2018, Pinckney was working for Mills Fleet Farm and engaged in his normal job duties. Claimant was lifting a large tire onto a machine when his back "popped." (Hr. Tr., p. 14) Pinckney reported the injury to his supervisor and finished out his shift. (Id.) Defendants concede that Pinckney injured his low back as a result of lifting the tire, but dispute whether claimant has proven he sustained a permanent injury. (Hearing Report)

The next day, claimant presented to work and told the same supervisor he could hardly walk. Claimant filled out an injury report and requested medical treatment. (Hr. Tr., p. 15) The injury report provides that claimant did not initially think much of the injury, because it had been a "reoccurring incident." (Ex. 4, p. 20)

At hearing, claimant testified that the pain he experienced after the August 24, 2018, incident was in the same location as the pain he experienced following an injury at Victoria Cleaners in November 2013. (Hr. Tr., p. 46)

At this juncture, it is worth discussing claimant's pre-existing low back treatment and symptoms.

Medical records in evidence reflecting Pinckney's pre-existing low back treatment and symptoms date back to 2006. (See JE2, p. 6; JE3, p. 1) While the actual report is not in evidence, medical records reference the fact claimant obtained an MRI of his lumbar spine in August 2006. (See JE2, p. 6; JE3, p. 1)

Claimant sustained a prior injury to his lumbar spine while working for Victoria Cleaners in November 2013. (Hr. Tr., p. 40; See Ex. E) On the date of injury, claimant and a co-worker were picking up a cast iron sewing machine when claimant felt a "pop" in his low back. (Ex. E, p. 2) Claimant experienced immediate pain in his low back that he described as a tight, burning sensation. (Id.) Initially, claimant was diagnosed with a lumbar strain. His authorized treating physician prescribed him medication and referred him to physical therapy. (Id.) Despite complaints of ongoing pain, claimant's treating physician discharged him from medical treatment in December 2013. (Ex. E, p. 3)

On or about July 19, 2014, claimant aggravated his low back condition while loading some landscaping bricks into his truck. (Hr. Tr., p. 42; See Ex. E, p. 3) On July 21, 2014, claimant also noticed an increase in pain and numbness down his lower extremity after lifting an 80-pound bag at work. (JE2, p. 1) Claimant complained of bilateral low back pain and numbness in his foot. (Id.) At hearing, claimant testified he experienced pain in his low back, buttocks, and bilateral lower extremities following the July 2014 incident. (Hr. Tr., p. 49)

An MRI, dated August 11, 2014, revealed mild midline disk herniation at L1-L2, a small extruded disk herniation at L3-L4, and a broad based, left-sided disc protrusion at L4-L5 that produced mild mass effect on the budding left L5 nerve root. (Id.)

Claimant presented to David Hatfield, M.D. for an orthopedic evaluation on August 21, 2014. He continued to describe low back, bilateral buttock, and left leg pain. (JE4, p. 2) Claimant's pain diagram depicts the feeling of numbness/tingling down the left lower extremity, with burning, numbness/tingling in the bilateral feet. (JE4, p. 6) Claimant relayed that his pain was sharp, burning, and constant throughout the day. (Id.) Dr. Hatfield documented a positive straight leg raise, bilaterally. (Id.) Dr. Hatfield did not feel claimant was a surgical candidate at the time. Instead, he recommended epidural steroid injections (ESI); however, claimant did not pursue the same. (See JE4, p. 1) At hearing, claimant confirmed Dr. Hatfield offered him epidural steroid injections. (Hr. Tr., p. 67)

Between August 2014 and May 2015, claimant regularly presented for chiropractic treatments in Altoona, Iowa. (See Ex. E, p. 3)

Claimant presented to Robin Sassman, M.D. for an IME on May 13, 2015. (Ex. E, p. 1) He described pain in his low back, left hip, groin, and left testicle. (Ex. E, p. 4) Claimant told Dr. Sassman that he is never pain free. (Id.) Claimant was not operating under any restrictions at the time of his examination; however, he did relay that he self-restricted his lifting. (Id.) Dr. Sassman diagnosed claimant with low back pain with radiculopathy, and MRI evidence of disk herniation at L1-L2, L3-L4, and L4-L5. (Ex. E, p. 6) Like Dr. Hatfield, Dr. Sassman recommended claimant pursue epidural steroid injections through a pain management specialist. (Id.) Dr. Sassman further opined that if the ESI was ineffective, claimant should pursue a second opinion from a neurosurgeon due to the multiple levels of herniation and his ongoing symptoms. (Id.) In terms of permanent impairment, Dr. Sassman assigned 18 percent impairment to the whole person for deficits in range of motion and multiple disk herniations. (Ex. E, p. 7) For permanent restrictions, Dr. Sassman recommended claimant limit lifting, pushing, pulling, and carrying to 20 pounds, rarely, from floor-to-waist, 20 pounds, occasionally, from waist to shoulder, and 20 pounds, rarely, above shoulder height. Dr. Sassman also recommended that claimant limit sitting, standing, and walking to an occasional basis. (Id.)

At hearing, claimant could not recall whether Dr. Sassman recommended permanent restrictions in 2015. (Hr. Tr., p. 55) In any event, it does not appear as though claimant adopted or adhered to the recommendations contained in Dr. Sassman's IME report.

Claimant ultimately settled his workers' compensation claim for the November 2013 work injury on a compromise settlement basis in January 2016. (Ex. D)

Returning to the matter at hand, defendants initially authorized medical treatment through Concentra Occupational Health; however, because Concentra was not open on Saturday, August 25, 2018, defendants authorized medical treatment through Broadlawns Medical Center. (Hr. Tr., p. 16; See JE6, p. 1)

Lisa Klock, D.O., of Broadlawns administered a Toradol injection and ordered x-rays of claimant's lumbar spine. The x-rays revealed degenerative changes, but no other acute abnormalities. (JE6, p. 3)

Claimant presented to Carlos Moe, D.O. of Concentra on August 28, 2018. (See JE7) Dr. Moe prescribed physical therapy and returned claimant to work with restrictions of no lifting or pushing greater than 10 pounds, no bending at the waist, and no kneeling. (JE7, p. 10)

Dr. Moe continued to treat claimant throughout September and part of October 2018. (See JE7, pp. 4-72) In total, claimant presented for 6 medical appointments with Dr. Moe and 11 physical therapy appointments. (Hr. Tr., pp. 19-20; See JE7) Claimant consistently reported low back pain and decreased range of motion throughout his course of treatment. (See JE7, pp. 6, 18-19, 22-23, 26-27, 30-31, 36-37, 41-42, 53-54, 57-58, 63, 66, 70) The majority of the Concentra medical records in evidence are from physical therapy.

While it does not appear the incident resulted in a material aggravation, it is worth noting that at his September 11, 2018, physical therapy appointment, claimant relayed that he had recently attempted to lift a tire at his home and experienced an aggravation of his low back pain. Claimant acknowledged that such an activity fell outside of his 10-pound lifting restriction. (JE7, p. 26)

On September 21, 2018, claimant presented to physical therapy with 4/10 pain in the lumbar spine. Claimant told his physical therapist that this was his "normal soreness." (JE7, p. 45) Claimant reported that he was often sore following work. Claimant's physical therapist explained to claimant that such soreness was rather normal and expected. (Id.)

On September 24, 2018, claimant again reported 4/10 pain and provided this was his usual level of pain "from years ago." (JE7, p. 49)

Claimant last presented to Dr. Moe on October 15, 2018. (JE7, p. 66) At this final visit, claimant continued to complain of pain, tenderness, and decreased range of motion with some radicular symptoms down the left lower extremity. (Id.) At claimant's request, Dr. Moe referred him for an independent evaluation to assess his current status and need for permanent work restrictions. (JE7, p. 67)

On February 8, 2019, claimant presented to Todd Harbach, M.D. for an orthopedic evaluation. (JE8, p. 1) Dr. Harbach diagnosed claimant with lower back pain, lumbar spondylosis, and left lower extremity pain. (Id.) Following his examination, Dr. Harbach ordered an MRI of claimant's lumbar spine. (Id.)

The MRI, dated March 6, 2019, revealed loss of disk height at L1-L2, L2-L3, and L3-L4, posterior high intensity zones indicative of annular tears at L3-L4 and L4-L5, and

a small posterior disk bulge to the right at L3-L4 that could be compressing the exiting right L4 nerve root. (See JE8, p. 6)

Claimant returned to Dr. Harbach on March 11, 2019. Claimant continued to complain of pain with activity; however, he noted that working part-time was helping to improve his pain. After reviewing claimant's MRI, Dr. Harbach opined claimant had reached a plateau in his treatment and placed claimant at maximum medical improvement (MMI). At hearing, claimant confirmed he reported minimal complaints to Dr. Harbach in March 2019. (Hr. Tr., p. 67) Dr. Harbach released claimant to full duty work, without restrictions, on March 20, 2019. (JE8, p. 6) Dr. Harbach opined,

> I would not recommend he get into a manual labor-type job where he does heavy, heavy lifting because of his age and the normal degeneration of his lumbar spine. His work or any work is not responsible for normal degeneration but work can aggravate that degeneration. His work could have done that and he is now recovered to his baseline with just minimal discomfort.

(Id.) At hearing, claimant testified he continued to experience issues within his low back at the time Dr. Harbach released him to full duty work. (Hr. Tr., p. 23)

Two days after his release, claimant applied for a part-time position as a delivery driver at Hy-Vee. (Ex. C, p. 1; Hr. Tr., p. 62) Claimant testified he was hired immediately. (Hr. Tr., p. 61) On his application for employment, claimant provided that he would have no problems being on his feet for extended periods of time, or repeatedly bending and lifting. Claimant further provided he could meet the physical expectations of the job. (Ex. C, p. 3)

Claimant terminated his employment with the defendant employer, citing "[r]etirement" and "better pay," on March 21, 2019. (Hr. Tr., pp. 34, 60, 82) His last day of work for the defendant employer was March 16, 2019. Ms. Reitan testified claimant did not indicate he was terminating his employment as a result of issues related to his back injury. (Hr. Tr., p. 82) Ms. Reitan also testified claimant's regular, full-time position would have been available to him had he not quit on March 21, 2019. (Hr. Tr., pp. 83-84)

As a delivery driver, claimant loads and unloads a van with food and delivers said food to customers. (Hr. Tr., p. 35) He works alone. (Hr. Tr., p. 65) The physical requirements of the delivery driver position include the ability to perform medium work, "occasionally lifting or carrying objects of no more than 50 pounds, with frequent standing, walking, and lifting/carrying of objects of no more than 25 pounds." (Ex. C, p. 5)

Claimant continues to work 25 hours per week at Hy-Vee. (Hr. Tr., p. 34) He is meeting all of the physical expectations of his position. (Hr. Tr., p. 64) He plans to continue working for Hy-Vee indefinitely. (Hr. Tr., pp. 43-44)

There is some dispute as to whether claimant personally notified the defendant employer of Dr. Harbach's release to full-duty work. Claimant asserts he provided the medical release to the defendant employer, and the defendant employer did not offer to return him to his full-duty position. Defendants assert claimant did not provide the medical release to the defendant employer and instead sought out and obtained alternative employment. Defendants imply claimant had no motivation to return to his full-time, full duty position given his voluntary transfer to the gate guard position, and his decision to seek a different part-time job through Hy-Vee. Defendants further assert that claimant would have been able to return to his full duty position if they were aware of the medical release, assuming claimant wanted to return to the same.

Dr. Harbach's medical release was generated and signed on March 12, 2019. (See JE8, p. 6) Claimant did not specifically testify that he provided this particular medical release to the defendant employer; however, he did testify he brought paperwork to his supervisor after every medical appointment. (Hr. Tr., p. 24) The parties appear to agree that the claims adjustor received the medical release at some point in time; however, they disagree as to when the adjustor received the report. Claimant asserts the adjustor would have received the medical release immediately, while defendants assert the adjustor did not receive the medical release until March 20, 2019, when the document shows it was faxed from Dr. Harbach's office. (See JE8, p. 6)

Presumably, this dispute arises out of the 2017 amendment to Iowa Code section 85.34, providing injured workers are only entitled to payment of their functional impairment if they return to work or are offered work for which they will receive or would receive the same or greater wages than they received at the time of the injury. If claimant was not offered a return to his full duty position, an argument would exist that he is entitled to industrial disability benefits.

Outside of independent medical examinations, claimant did not present for any additional medical treatment related to his low back condition between March 20, 2019, and the date of the evidentiary hearing. (Hr. Tr., p. 24) Claimant is not currently presenting for any medical treatment related to his low back condition. He does not have any plans to seek additional treatment at this time. He is not taking any prescription or over-the-counter medications for pain. (Hr. Tr., p. 66)

Claimant relies upon the medical opinion of Sunil Bansal, M.D., in support of his claim that he sustained permanent disability as a result of the stipulated low back injury on August 24, 2018.

Claimant presented for an independent medical examination, conducted by Dr. Bansal, on September 25, 2019. (Ex. 1, p. 1) Claimant continued to complain of low back pain, with radiating pain into his left lower extremity and foot. (Ex. 1, p. 4) Claimant reported the ability to sit for one hour. He provided he walks all day at work and can lift 30 pounds. (Id.) Dr. Bansal diagnosed claimant with annular tears and disc bulging at L3-L4 and L4-L5. (Ex. 1, p. 6) He agreed with Dr. Harbach that claimant

reached MMI on March 11, 2019. (Id.) Dr. Bansal assigned five percent (5%) impairment to the body as a whole and recommended a 30-pound permanent lifting restriction. (Ex. 1, p. 7) Dr. Bansal further recommended claimant avoid frequent bending, twisting, and prolonged sitting greater than 30 minutes at a time. (Id.)

Dr. Bansal's report includes a summary of the medical records he reviewed prior to reaching his ultimate conclusions. The summary does not include the August 2006 MRI, the August 2014 MRI, or any medical records pertaining to the November 2013 and July 2014 injuries. (See Ex. 1, pp. 1-4) The report does, however, detail that claimant had previously injured his back after lifting a cast-iron object. (Ex. 1, p. 5) The report goes on to provide that claimant received chiropractic treatment, but no injections or surgical intervention. (Id.) The report provides claimant's pain resolved with chiropractic manipulations. (Id.)

Claimant's annular tears and disc bulging at L3-L4 and L4-L5 were objectively present on claimant's pre-existing MRI report, dated August 11, 2014. Dr. Bansal's report does not address how the August 24, 2018, work injury materially aggravated or worsened claimant's annular tears and disc bulges at L3-L5; his report does not address the 2014 MRI report at all. Rather, Dr. Bansal attributes the annular tears and disc bulging to the August 24, 2018, work injury. Moreover, Dr. Bansal incorrectly believed claimant's 2013 and 2014 symptoms resolved following chiropractic treatment. At hearing, claimant acknowledged that he occasionally experienced problems within his low back prior to August 24, 2018. (Hr. Tr., p. 60) Due to the fact Dr. Bansal did not have an opportunity to review claimant's pre-existing medical records, I find Dr. Bansal's report is based on an inaccurate or incomplete medical history.

Additionally, the evidentiary record does not support a finding that the restrictions recommended by Dr. Bansal accurately reflect claimant's physical capabilities. Claimant certified on his job application that he was capable of performing all essential functions. Claimant continues to perform work as a delivery driver for Hy-Vee Catering, which requires him to occasionally lift and carry up to 50 pounds, and frequently stand, walk, lift, and carry objects up to 25 pounds. (Ex. C, p. 5) He is able to perform all of the essential functions of his job and claimant plans to continue working for Hy-Vee as long as they will have him. For these reasons, I decline to adopt the permanent restrictions recommended by Dr. Bansal.

Due to the fact Dr. Bansal's medical opinions are based on an inaccurate or incomplete medical history, and because I find Dr. Bansal's restrictions do not accurately reflect claimant's capabilities, I do not find Dr. Bansal's report to be persuasive.

It is clear claimant sustained an injury to his low back on August 24, 2018. This much is stipulated to on the hearing report. In order to prove he sustained permanent disability as a result of the August 24, 2018, work injury, claimant had to show that his pre-existing condition was materially and permanently aggravated by the August 24, 2018, work injury. I find claimant failed to do so. When considering the evidentiary

record as a whole, I find claimant sustained a temporary flare-up of his pre-existing low back condition on August 24, 2018.

Mr. Pinckney asserts a claim for temporary partial disability (TPD) benefits between September 1, 2018, and March 11, 2019. (Ex. 5, p. 37) Exhibit 5 provides sufficient evidence of TPD benefits owed. I find claimant is entitled to TPD benefits for the time period of September 1, 2018, to October 27, 2018, provided in Exhibit 5.

Mr. Pinckney asserts a claim for temporary partial disability benefits between November 12, 2018, and March 11, 2019, based on the fact he sustained a temporary partial reduction in his earning ability after he was transitioned from a full-time position to a part-time position. Defendants essentially contend Pinckney was offered light duty work consistent with his medical restrictions, but claimant declined the offered work by voluntarily transitioning to a part-time position. In order to be compensable, the temporary reduction in earning ability must be a result of the work injury.

The defendant employer was able to accommodate claimant's restrictions. Claimant's light duty work consisted of working as an advisor at the front of the auto service center on a full-time basis. (Hr. Tr., pp. 79-80) As an advisor, claimant answered phones and scheduled appointments for customers. (Hr. Tr., pp. 29-30) Defendants elected to pay claimant his pre-injury rate of pay. (See Hr. Tr., p. 29) Claimant testified the advisor position was stressful. (Hr. Tr., p. 30)

Effective November 12, 2018, the defendant employer transferred claimant to the part-time position of gate guard. (Hr. Tr., pp. 31-32) As a part-time gate guard, claimant worked approximately 26 hours per week. Due to the change to part-time work, claimant lost his full-time benefits and received significantly less money. (Hr. Tr., p. 31) Claimant worked as a gate guard for the remainder of his time with the defendant employer. (Hr. Tr., p. 33)

The parties dispute how it came to be that claimant was transferred to the gate guard position. According to claimant, the transfer was an involuntary one, made by management. (Hr. Tr., p. 30) Claimant testified that he, "asked them if there was anyplace else [he could work]." (Id.) Claimant implies he was assigned to work the gate guard position and he then asked if there were any other positions he could move into.

Lisa Reitan, the human resources business partner for the defendant employer, provided a different rendition of how it came to be that claimant was transferred to a part-time position. According to Ms. Reitan and the defendant employer, claimant asked if there was "anyplace else" he could work other than the auto shop. More specifically, Ms. Reitan provided,

> [Claimant] approached my office, said he had talked to his auto service center manager Mat Miner saying that he wanted to step to a part-time position. However, there were no part-time positions in the auto service

> center at that time, so the only part-time position that we had at that time was a gate guard position. I gave him the job description, let him know that the pay would be decreased and that his benefits would stop as a full-time employee.

(Hr. Tr., p. 80) Ms. Reitan testified that the defendant employer did not, in any fashion, direct, coordinate, or begin the discussions regarding claimant's change to a part-time position. (Hr. Tr., pp. 80-81) Ms. Reitan further testified that claimant's personnel record would only have contained paperwork memorializing a change in claimant's job status if the change in job status was involuntary. (Hr. Tr., pp. 86-87) The only document in the evidentiary record referencing a change in position provides, "As your employment with Fleet Farm has changed from Full-Time to Part-Time, please see the following allocation of benefits." (Ex. 4, p. 22) In a perfect world, the defendant employer would include documentation explaining the reasoning behind all changes of employment. Clearly, that did not happen in this situation.

After reviewing the evidentiary record and considering all testimony provided, I find claimant's transition to the part-time gate guard position was likely voluntary. Ms. Reitan provided clear and convincing testimony regarding the events that preceded claimant's transition to part-time employment. In contrast, claimant did not address how it came to be that he was being transferred, only that he was in fact transferred and that it was at management's discretion. Claimant was not positive he received the letter documenting the transition and its impact on his full-time benefits. Claimant did not expressly dispute that the conversation between claimant and Ms. Reitan occurred. He did, however, provide testimony that implied some form of communication occurred between he and management. On cross-examination, claimant's attorney did not address the alleged conversation with Ms. Reitan. Claimant was not called to rebut the testimony of Ms. Reitan.

While it is undisputed claimant made less money in the part-time gate guard position, it is claimant who bears the burden of proving the reduction in earnings was causally related to the work injury. Claimant failed to carry that burden in this matter. I found claimant failed to prove his transition to part-time employment was involuntary. I further find claimant failed to prove the reduction in earnings he experienced after November 11, 2018, was a result of the work injury. There is little to no evidence claimant was incapable of completing the job duties assigned to him in the full-time advisor position. There is no evidence claimant sought a transfer due to ongoing pain or discomfort resulting from his light duty position. For these reasons, I find claimant failed to carry his burden of proving entitlement to temporary partial disability benefits between November 12, 2018, and March 11, 2019.

Based on the testimony provided at hearing, defendants no longer dispute liability for the Broadlawns medical bill contained in Exhibit 2.

For reasons that will be discussed in the Conclusions of Law section, I find claimant is entitled to reimbursement for Dr. Bansal's IME report under Iowa Code section 85.39.

Claimant demonstrated a denial, delay in payment, or termination in benefits. Claimant is entitled to penalty benefits for the unreasonable delay in paying TPD benefits between September 1, 2018, and October 28, 2018.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work-related injury on August 24, 2018. The initial dispute between the parties is whether claimant's August 24, 2018, stipulated work injury resulted in temporary disability.

Following the August 24, 2018, work injury, claimant was assigned a light duty position. Claimant continued to work on a full-time basis. He received the same rate of pay he was earning prior to the August 24, 2018, work injury. (Hr. Tr., p. 29) Claimant held this light duty position until November 11, 2018. Although claimant was working on a full-time basis and receiving his pre-injury rate of pay, it cannot be said claimant was capable of returning to substantially similar employment during this time.

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 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. Iowa Code section 85.33(2).

Claimant seeks temporary partial disability benefits from September 1, 2018, through March 11, 2019.

Claimant produced no evidence of the actual hours he worked for the week of September 1, 2018. Claimant either failed to seek or failed to include the necessary documentation to establish his claim for TPD benefits for the week of September 1, 2018. Claimant did, however, produce evidence of his hours worked and total earnings for pay periods ending on September 29, 2018; October 13, 2018; and October 27, 2018. Claimant earned less than his average weekly wage during these time periods. I find claimant's TPD calculations to be correct for the abovementioned pay periods. I find claimant has established entitlement to TPD benefits for pay periods ending on September 29, 2018; October 13, 2018; and October 27, 2018.

With respect to all pay periods between November 12, 2018, and March 11, 2019, I found claimant failed to produce convincing evidence that his transition to

part-time employment was involuntary. 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 R. App. P. 6.14(6). Therefore, claimant had the burden to establish entitlement to the temporary partial disability benefits he now seeks. I did not find claimant's testimony regarding his transition to part-time work convincing. Instead, I found claimant voluntarily requested a transfer to part time work as testified to by Ms. Reitan. As such, I find claimant failed to establish entitlement to any temporary disability benefits between November 12, 2018, and March 11, 2019.

The next issue to be decided in this case is whether claimant's August 24, 2018, injury resulted in permanent disability.

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).

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

The parties stipulated to claimant sustaining an injury arising out of and in the course of employment on August 24, 2018. (Hearing Report, File No. 5066786). As a result of this injury, defendants authorized treatment with Dr. Moe of Concentra Medical Center. (JE7) At claimant's request, Dr. Moe referred claimant to orthopedic specialist, Dr. Harbach. Dr. Harbach placed claimant at MMI for his August 24, 2018, injury, on March 11, 2019. (JE8, p. 6) Dr. Harbach opined claimant's work for the defendant employer is not responsible for normal degeneration. He further opined the August 24,

2018, work injury could have aggravated the pre-existing condition; however, in his opinion, claimant had recovered and returned to baseline. (Id.) I understand this to be an opinion that claimant's injury was temporary in nature.

Dr. Harbach's opinion is consistent with the evidentiary record as a whole.

Like the injury claimant sustained in November 2013, claimant experienced a "pop" in his low back after lifting a heavy item. Claimant received conservative treatment, including physical therapy. Approximately one month after the August 24, 2018, injury, claimant presented to physical therapy reporting "normal soreness" and his usual level of pain "from years ago." (JE7, pp. 45, 49) Claimant's physical therapist relayed that such soreness was rather normal and to be expected. (JE7, p. 45) The March 6, 2019, MRI report revealed annular tears at L3-L4 and L4-L5, and a small posterior disc bulge to the right at L3-L4. (JE8, p. 6) While there is no expert opinion addressing the similarities between the two MRI reports, the findings of the 2019 MRI report appear to be substantially similar to the 2014 MRI report. (*Compare* JE8, p. 6 *with* JE3, pp. 1-2)

Claimant was placed at MMI on March 11, 2019. Shortly thereafter, claimant presented for an IME with Dr. Bansal. Dr. Bansal diagnosed claimant with annular tears and disc bulging at L3-L4 and L4-L5. (Ex. 1, p. 6) In May 2015, Dr. Sassman diagnosed claimant with low back pain with radiculopathy and MRI evidence of disk herniation at L1-L2, L3-L4, and L4-L5. (Ex. E, p. 6) In the same May 2015 report, Dr. Sassman assigned 18 percent impairment to the whole person as a result of claimant's low back condition, and recommended permanent restrictions. Dr. Sassman provided claimant should limit lifting, pushing, pulling, and carrying to 20 pounds from floor-to-waist, rarely, 30 pounds from waist-to-shoulder, occasionally, and 20 pounds above shoulder height, rarely. (Ex. E, p. 7) In 2019, Dr. Bansal assigned 5 percent impairment to the whole person and recommended a blanket 30-pound permanent lifting restriction. (Ex. 1, p. 7)

Claimant was not a surgical candidate following the November 2013 and July 2014 injuries, and no physician has opined claimant became a surgical candidate following the August 24, 2018, work injury.

The undersigned is cognizant of the fact claimant obtained a full-time, full-duty position with the defendant employer following the November 2013 and July 2014 injuries. The undersigned is also cognizant of the fact there is no evidence in the record to show claimant had any difficulties completing his job duties for the defendant employer between his date of hire and August 24, 2018. This is the strongest evidence that claimant sustained a permanent injury on August 24, 2018. That being said, claimant was released without restrictions on March 11, 2019. He has not presented for medical care related to his low back since that time. Three days after being released without restrictions, claimant filled out a job application asserting he had "no problems" with being on his feet for extended periods of time, repetitive bending, or repetitive lifting. (Ex. C, p. 3) Claimant's current position requires him to lift between 25 and 50

pounds. (Ex. C, p. 5) At hearing, claimant testified he is meeting all of the physical expectations of his position. (Hr. Tr., p. 64) While it is true claimant's current position is part-time, it is also true that claimant did not test his ability to return to his full-time, full-duty position with the defendant employer. Moreover, he did not test his ability to return to full-time employment with any employer. Claimant applied for and accepted a part-time position with Hy-Vee with the knowledge that he had been released to return to work without restrictions.

Dr. Bansal is the only physician in the evidentiary record to provide claimant sustained permanent disability as a result of the August 24, 2018, work injury. I found Dr. Bansal's IME report was based on an incomplete medical history and his permanent restrictions do not accurately reflect claimant's physical capabilities. As such, I reject the opinions of Dr. Bansal in this case.

Instead, I find the opinions of Dr. Harbach persuasive on the issue of whether claimant sustained permanent disability as a result of the August 24, 2018, work injury. As explained above, Dr. Harbach's opinion is consistent with the evidentiary record as a whole. Having found the opinions of Dr. Harbach most convincing, by a preponderance of the evidence, I found claimant failed to carry his burden of proving the August 24, 2018, injury resulted in permanent disability.

I specifically find that Mr. Pinckney has a long-standing, deteriorating spine condition in his low back. He has had ongoing symptoms in his low back and lower extremities since at least November 2013. I find that claimant has not proven the August 24, 2018, work injury caused or materially aggravated his pre-existing low back condition. Mr. Pinckney likely experienced a temporary increase in symptoms subsequent to the lifting injury on August 24, 2018. After approximately one month, claimant's pain had returned to normal levels.

Mr. Pinckney seeks an order requiring defendants to reimburse his independent medical examination fees pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated permanent disability and the employee believes that the initial evaluation is too low. 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 (Appeal April 26, 1991).

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

Prior to the court's decision in Young, this agency had held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the injured worker sustained permanent impairment related to the injury. Countryman v. Des Moines Metro Transit Authority, File No. 5009718 (App. March 16, 2006); Kuntz v. Clear Lake Bakery, File No. 1283423 (Rehearing July 13, 2004).

The supreme court's decision in Young, as well as several recent appeal decisions, support a finding that said inference is no longer applicable to open the door for injured workers to obtain a section 85.39 examination. Instead, there must be a definitive permanent impairment rating rendered by a physician selected by the defendants before the injured worker qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

In cases where defendants have accepted liability but have not obtained an impairment rating, the commissioner has concluded that a release to full-duty work and placement at MMI, coupled with a failure to expressly opine as to impairment, is not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. September 2018).

Defendants still have an obligation, in the course of their ongoing duty to investigate an injured worker's claim, to inquire into the extent of permanent impairment following the end of a healing period. See Moffitt v. Estherville Foods, Inc., File Nos. 5029474, 5029475, and 5029476 (App. September 21, 2011). Failure to make such an inquiry can result in the assessment of penalty benefits. See Stroud v. Square D, File No. 5013498 (App. June 21, 2006).

If defendants unduly delay in seeking an examination under section 85.39, or fail to obtain an evaluation of permanent impairment altogether, the supreme court has held that the injured worker's recourse is a request to the commissioner to appoint an independent physician to examine the injured worker and make a report. See Young, 867 N.W.2d 839, 845 (Iowa 2015); Iowa Code section 86.38. In practice, the looming threat of penalty benefits for failure to investigate the extent of permanent impairment, once communicated, should encourage timely action.

If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the

employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Young, at 847 (citing Iowa Code § 85.39)

In this case, there is clear evidence that claimant requested to be seen by an independent physician for a disability evaluation. (JE7, p. 71) Pursuant to claimant's request, the authorized treating physician referred claimant for an "Independent Medical Exam." (Id.) At the time Dr. Moe referred claimant to Dr. Harbach, defendants had accepted claimant's low back injury as compensable. It cannot be said that defendants referred claimant to Dr. Harbach for purposes of obtaining a causation opinion. By scheduling claimant for an appointment with Dr. Harbach, the defendants "[made] the initial arrangements for the evaluation." Young, at 847 (citing Iowa Code § 85.39) Claimant, dissatisfied with the evaluation arranged by the employer, presented to Dr. Bansal for an independent evaluation. This case is distinguishable from Sainz, as claimant definitively requested an IME from defendants prior to seeking his own independent evaluation, he was not simply released by his authorized treating physician. Claimant took an active role in securing a disability evaluation from the defendant employer. While the disability evaluation did not result in an impairment rating, this does not change the substance of the evaluation.

Therefore, I conclude that claimant met his burden of establishing entitlement to reimbursement of Dr. Bansal's independent medical examination fees pursuant to Iowa Code section 85.39. I further find defendants failed to provide convincing evidence that Dr. Bansal's IME fees are unreasonable. As such, I find Dr. Bansal's IME fees are reasonable.

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

Iowa Code section 86.13(4) provides:

> 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 in 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

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).

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for

imposition of a penalty. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

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.

By this decision, the undersigned determined claimant is entitled to TPD benefits. At the time of the evidentiary hearing, defendants had paid no TPD benefits to claimant. As such, unpaid benefits exist. Claimant has established a delay in payment of benefits as required by section 86.13(4).

Pursuant to section 86.13(4)(b)(2), the burden therefore shifts to defendants to establish a reasonable or probable cause or excuse for the delay. Section 86.13(4)(c) sets forth the elements defendants must satisfy in order to establish the existence of a reasonable or probable cause or excuse for the delay.

In their post-hearing brief, defendants maintain that claimant is not entitled to TPD benefits. Defendants offer no other argument regarding penalty. Defendants failed to establish the existence of a reasonable or probable cause or excuse for their delay. As such, penalty benefits are warranted on this basis. Penalty benefits are applicable for the TPD benefits in question at the rate of 50 percent. Fifty (50) percent of $327.91 is $163.96.

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 cost of the filing fee ($100.00). Defendants concede liability for the cost of the filing fee ($100.00).

ORDER

Defendants shall pay claimant temporary partial disability benefits from September 29, 2018, through October 27, 2018, for a combined total amount of three hundred twenty-seven and 91/100 dollars ($327.91), as set forth in Claimant's Exhibit 5, page 36.

The employer and insurance carrier 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 have agreed to pay the outstanding Broadlawns medical bill contained in Exhibit 2.

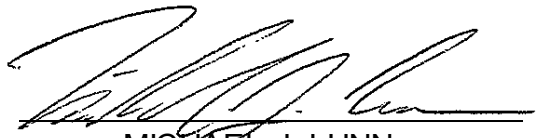
Defendants shall reimburse claimant for Dr. Bansal's independent medical evaluation pursuant to Iowa Code section 85.39 in the amount of two thousand six hundred forty-one and 00/100 dollars ($2,641.00).

Defendants shall pay claimant penalty benefits in the amount of one hundred sixty-three and 96/100 dollars ($163.96).

Defendants shall reimburse claimant costs totaling one hundred and 00/100 dollars ($100.00).

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

Signed and filed this 7th day of July, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas A. Palmer (via WCES)

Lee Pomeroy Hook (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.