BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN STIGLEMAN, Claimant, vs. CACTUS OPERATING LLC, Employer, and NATIONWIDE, Insurance Carrier, Defendants.	File Nos. 5068602.01, 19005055.01 A R B I T R A T I O N D E C I S I O N Head Notes: 1402.40, 1403.10, 1800, 2206, 2907

STATEMENT OF THE CASE

Claimant Brian Stigleman filed petitions in arbitration seeking workers' compensation benefits from defendants Cactus Operating LLC, employer, and Nationwide Mutual Insurance Company, insurer. The hearing occurred before the undersigned on August 31, 2020, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 15, Claimant's Exhibits 1 through 10 and 16, and Defendants' Exhibits A through D and F. Claimant testified on his own behalf, as did his wife, Betty Stigleman. Defendants' representative Jacob Koch also testified.

Prior to hearing, claimant filed an objection to defendants' report from William Boulden, M.D., which was dated August 27, 2020. This report came after a conference that occurred with defendants' counsel on July 28, 2020. The report was served on claimant on August 27, 2020, just four days before hearing. Clamant objected on the basis that the report was untimely and prejudicial.

Defendants responded, arguing that several of claimant's expert opinions—particularly the independent medical examination (IME) report of Jeffrey Pederson, D.O., that was served on July 26, 2020—were untimely because they were served less than 60 days before hearing. This rule on which defendants' rely, however, pertains to discovery completion deadlines—not the exchange of expert witness reports. (See Hearing Assignment Order ("On or before 60 days prior to hearing, both parties shall serve opposing parties with all intended discovery requests, requests for independent medical examinations, and responses to all discovery requests that were served by opposing parties more than 30 days previously.")).

The rule that governs the exchange of expert witness reports requires the exchange of such reports no less than 30 days before hearing. (See Hearing Assignment Order ("At least 30 days prior to hearing, all parties shall serve a witness and exhibit list on all opposing parties and exchange all intended exhibits that were not previously required to be served."); 876 IAC 4.19(3)(c)-(d)). In this case, the 30-day deadline was August 1, 2020, and Dr. Pederson's IME report was timely served on July 26, 2020.

When confronted with this rule, defendants acknowledged the report was timely exchanged but emphasized it afforded defendants no opportunity to respond. (Hearing Transcript, page 15) Defendants asserted claimant was "purposely timing obtaining and serving expert reports to make it nearly impossible for defendants to reply prior to an August 31, 2020 hearing date." (Hrg. Tr., p. 13) Defendants further argued claimant was "hid[ing] the ball as a strategy" and that it is "unfair to allow claimants to have a tactic of providing everything at the last minute so defendants have no opportunity to respond at all." (Hrg. Tr., pp. 14, 16)

As I stated in the hearing, I acknowledge this is common practice by claimants and often results in some level of gamesmanship that may disadvantage defendants. As such, deputy commissioners, including myself, will sometimes allow late responsive reports from defendants' experts, particularly if such reports are obtained swiftly (not on the eve of hearing) or if a claimant's expert raised a new opinion or addressed a new issue.

In this case, however, Dr. Boulden's report was not signed until August 27, 2020—just days before hearing. When asked why the report came nearly a month after defendants' conference with Dr. Boulden, defendants' counsel explained that Dr. Boulden "had asked us to locate information"—specifically claimant's discogram. (Hrg. Tr., pp. 17-18) Notably, however, claimant's discogram was performed on May 15, 2020—months before defendants' conference with Dr. Boulden. (Joint Exhibit 13, p. 3) Based on this discogram, Todd Harbach, M.D., recommended surgery on May 21, 2020—again, months before defendants' conference with Dr. Boulden. (JE 8, pp. 45-47) Furthermore, defendants certainly could have anticipated Dr. Pederson's reliance on the same discogram, yet defendants offered no explanation as to why they did not or could not provide the discogram to Dr. Boulden and request his opinion on it months before receipt of Dr. Pederson's report.

Given that Dr. Pederson's report was timely served, defendants were aware of the discogram long before the 30-day deadline, and that Dr. Boulden's report was not served until four days before hearing, I excluded Dr. Boulden's late report from the record.

The evidentiary record was closed at the end of the hearing, and the case was considered fully submitted upon receipt of the parties' briefs on October 16, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

File No. 5068602.01:

1. Whether claimant is entitled to a running award of temporary benefits from December 20, 2019.

2. Whether claimant is entitled to reimbursement for medical expenses and related mileage.

3. Whether claimant is entitled to costs.

File No. 19005055.01:

1. Whether claimant is entitled to a running award of temporary benefits from December 20, 2019.

2. Whether claimant is entitled to reimbursement for his claimed medical expenses and related mileage.

3. Whether claimant is entitled to costs.

FINDINGS OF FACT

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

Claimant sustained stipulated work-related injuries on February 24, 2019 and May 20, 2019. The relevant question at hearing was whether his ongoing complaints are related to these work-related injuries and, if so, whether he has reached maximum medical improvement (MMI) and/or requires additional treatment.

Turning first to the February 24, 2019 date of injury, claimant was working as a breeder for defendant-employer when he came upon a sow that had been euthanized and needed to be moved. (Hrg. Tr., pp. 43-45; Claimant's Ex. 1) Claimant testified he "felt a pop" in his low back when he and a co-worker attempted to move the sow. (Hrg. Tr., p. 46)

Claimant waited until the next morning to report the injury, at which time he was sent to Lorie Cannon, DNP. (Hrg. Tr., p. 49) Consistent with his hearing testimony, claimant told Ms. Cannon he felt a pop in his lower back. (JE 2, p. 3) There is no discussion in the notes from that initial visit about any left hip pain or left leg pain; to the contrary, the pain was not radiating. (JE 2, pp. 3-4)

At claimant's next visit on February 28, 2019, claimant reported some tingling and numbness in his left leg, but again, no complaints of hip pain were noted. (JE 2, p. 5) Ms. Cannon referred claimant to physical therapy.

Claimant then initiated physical therapy. (JE 3, 5) When his symptoms did not improve, claimant returned to Ms. Cannon. At his visit on March 12, 2019, claimant again reported low back pain, this time with radiation into his left buttock. (JE 2, p. 12) Due to his lack of improvement, Ms. Cannon referred claimant to an orthopedic surgeon. (JE 2, p. 13)

Defendants authorized treatment with Dr. Boulden. When claimant was first evaluated by Dr. Boulden on March 21, 2019, he reported "constant low back pain" with pain radiating into his left leg. (JE 6, p. 1) Dr. Boulden kept claimant out of physical therapy and ordered an MRI. (JE 6, pp. 2-3) There was no mention of hip complaints.

Claimant's MRI was unremarkable but for degenerative changes. (JE 6, pp. 5, 8) Dr. Boulden referred claimant to a neurologist to address twitches in his left leg, but he believed "[a]bsolutely nothing is an operative problem." He instead recommended additional physical therapy for the ongoing lower back pain. There was no discussion regarding any hip complaints. (JE 6, p. 5)

Notably, it was not until his therapy in April of 2019 that claimant first reported pain in his groin with hip "popping." (JE 3, pp. 7, 12-14) While hip exercises and stretches were performed prior to this point, the complaints of popping and clicking and pain <u>specific to the hip</u> were not noted until April.

In fact, when claimant returned to Dr. Boulden on May 16, 2019, Dr. Boulden confirmed that it was the first time he was being made aware of claimant's hip complaints. He recommended an MRI. (JE 6, p. 14)

Dr. Boulden also clarified his position on the neurology referral: "I still want the patient to see a neurologist because of the history that he gives of the leg twitching. As I stated before this is not related to his spine." (JE 6, p. 14) Defendants then revoked their authorization of the neurology referral. (Hrg. Tr., p. 59)

Just a few days later, on May 20, 2020, claimant sustained his second work-related injury when he slipped and fell onto his tailbone. (Hrg. Tr., p. 60) Claimant returned to Dr. Boulden on May 30, 2020, after x-rays were taken on the date of injury. (JE 6, p. 17) After comparing the x-rays with claimant's MRI, Dr. Boulden was concerned about a possible compression fracture at L1; thus, Dr. Boulden recommended an updated MRI. (JE 6, p. 18)

Dr. Boulden reviewed the MRI and offered the following opinion:

> I do not see any evidence of any type of pathological processes other than mild degenerative changes. I do not see any evidence that he has a compression fracture at L1. There is evidence that he has a little wedging at T12. I think this is chronic since there is no bone edema at all. Therefore, he does have some degenerative disease at L5-S1 which is chronic in nature.

(JE 6, p. 21; see JE 6, p. 23) As a result, Dr. Boulden had nothing left to offer claimant from an orthopedic standpoint. He recommended referral to a physiatrist before imposing permanent work restrictions. (JE 6, p. 21)

In a responsive letter to defendants dated June 19, 2019, Dr. Boulden confirmed that claimant did not mention any hip complaints until May of 2019. Given this delay, Dr. Boulden opined he was unable to state with a reasonable degree of medical certainty that claimant's ongoing hip complaints were causally related to claimant's February 24, 2019 work injury. (JE 6, p. 25)

In the same letter, Dr. Boulden also confirmed that the neurology referral for claimant's leg spasms and tics was unrelated to his work injury and was instead related to a personal condition. (JE 6, p. 26)

Dr. Boulden ultimately opined that claimant reached MMI as of June 6, 2019 for an aggravation of degenerative disc disease but sustained no permanent impairment and required no permanent restrictions. (JE 6, p. 28)

However, in light of Dr. Boulden's referral to a physiatrist, defendants authorized a visit with Todd Troll, M.D. After a single visit, Dr. Troll opined that claimant's left hip pain was work related and should return to an orthopedist. (JE 10, p. 4) Notably, Dr. Troll took the following history from claimant regarding the February 24, 2019 date of injury: "[He] experienced sudden pain in the low back with a popping sensation as well as pain and a clicking sensation in the left hip." (JE 10, p. 1) As discussed above, however, claimant did not actually report clicking or pain in his left hip until April.

Regardless, when claimant returned to Dr. Troll in August of 2016, Dr. Troll reviewed claimant's two lumbar spine MRIs and—like Dr. Boulden—opined that there was "essentially no difference between the 2 studies." He suggested a possible EMG and additional physical therapy. With respect to claimant's left hip, he continued to recommend an orthopedic referral. (Cl. Ex. 10, p. 6)

Claimant ultimately had an MRI of his left hip at the recommendation of his primary care provider on August 26, 2019. It revealed an "essentially normal left hip." (JE 4, p. 14)

Claimant also had an EMG per Dr. Troll's recommendation on September 30, 2019. It revealed no evidence of peripheral neuropathy and no evidence of any acute left lower extremity radiculopathy. (JE 10, p. 11)

After the EMG, Dr. Troll placed claimant at MMI as of October 3, 2019 and assigned permanent restrictions per claimant's functional capacity evaluation (FCE) that was performed on October 16, 2019. (JE 10, pp. 12-15) The FCE placed claimant in the light to light-medium physical demand level. (JE 12)

Claimant had been working light duty consistent with his restrictions for defendant-employer prior to his release from Dr. Troll's care. But on September 27, 2019, claimant was terminated. (Hrg. Tr., p. 65) Claimant was terminated after allegedly giving a "false report" about assisting a co-worker who was having a seizure. (Hrg. Tr., pp. 65-70) Claimant testified he "caught" his co-worker, but a manager—who notably did not witness the incident—questioned claimant's description of the incident. When the manager arrived he did "not describe it as a very volatile situation," and both he and the co-worker having the seizure did "not understand why [claimant] would need to catch her." (Hrg. Tr., pp. 148-51; see Def. Ex., C)

Frankly, it is not clear why defendants believed claimant to be lying about the incident. Though claimant testified he "tweaked" his back during the incident, he made no claim for an aggravation of his condition or for any medical treatment as a result of assisting his co-worker. (Hrg. Tr., p. 70) In other words, claimant had nothing to gain from giving a false report. I find no reason to question the credibility of claimant's description of the incident. Thus, I find the conduct that led to claimant's termination was not serious or the type of conduct that would cause any employer to terminate any employee.

After his termination, in November of 2019, claimant began seeking treatment at Iowa Ortho on his own volition. He was referred to Steven Aviles, M.D., for his left hip pain and Trevor Schmitz, M.D. for his back complaints. (JE 8, p. 3) Dr. Aviles evaluated claimant first and noted he had a labral tear both on his left hip and his right hip, though the tear on the right side was completely asymptomatic. As such, Dr. Aviles did not believe the labrum was the source of claimant's left hip pain. He similarly did not see any evidence of a relationship between the hip joint and his buttock or radiating pain. He instructed claimant to return as needed. (JE 8, p. 7)

Claimant was then seen by Dr. Schmitz's physician's assistant, Robey Orewiler. Mr. Orewiler recommended injections for claimant's low back pain. (JE 8, p. 13) The SI joint injection provided no relief. (JE 8, p. 17) Mr. Orewiler then recommended an intra-articular hip injection for diagnostic purposes to determine if claimant's pain was coming from the hip. (JE 8, p. 19) That injection provided two days of complete relief, so claimant was referred back to Dr. Aviles. (JE 8, pp. 22-24)

Upon his return to Dr. Aviles on February 19, 2020, Dr. Aviles reaffirmed his belief that claimant's hip and back pain were separate issues. He offered claimant a second opinion for his back with Todd Harbach, M.D. (JE 8, p. 32)

After evaluating claimant, Dr. Harbach recommended a discography. (JE 8, p. 35) According to Dr. Harbach, this test was positive "at L5-S1 that was concordant and mildly positive L4-L5 with negative at L3-L4." (JE 8, p. 45) Per the radiologist, the

discogram revealed “degenerative disc disease with an annular tear” at L5 and “evidence of degenerative disc disease with annular tearing” at L3. (JE 13, p. 6) In response, Dr. Harbach recommended a fusion surgery. (JE 8, p. 47)

At the time of the hearing, claimant had not yet undergone the surgery due to insurance issues. (Hrg. Tr., p. 77)

In a responsive letter to claimant’s counsel in July of 2020, Dr. Harbach agreed that claimant’s work-related injuries “caused a permanent aggravation of his pre-existing condition” and that the recommended fusion surgery was likewise causally related. (JE 8, p. 48)

In the same letter, Dr. Harbach also agreed that claimant’s work injuries caused a labral tear that resulted in planned hip surgery. (JE 8, p. 48) Notably, however, Dr. Harbach did not provide treatment for claimant’s hip condition.

Contrary to Dr. Harbach’s opinion, Dr. Aviles then provided a responsive letter to defendants’ counsel in which he indicated he could not state within a reasonable degree of medical certainty that claimant’s hip condition was caused by either work-related injury. (JE 8, p. 49) Dr. Aviles again stated that he did not believe claimant’s left-sided labral tear was the source of his pain given his similar, asymptomatic tear on claimant’s right side. (JE 8, p. 50)

Claimant also underwent an IME with Dr. Pederson. With respect to claimant’s February 24, 2019 work injury, Dr. Pederson opined claimant sustained a left hip labral tear, aggravation of lumbar degenerative disc disease, and left lumbar radiculopathy. For the May 20, 2019 work injury, Dr. Pederson opined claimant sustained an aggravation of his lumbar degenerative disc disease, an aggravation and progression of L1 compression fracture, and aggravation of left lumbar radiculopathy. (JE 15, p. 10)

Contrary to Dr. Boulden’s opinion, Dr. Pederson compared claimant’s two lumbar MRIs and believed there was a “slight progression of the compression at L1 level.” Regardless, Dr. Pederson believed “[t]he annular tearing at the L5-S1 level, aggravation of the degenerative disc disease, and muscle spasms are more likely sources of his current pain.” (JE 15, p. 11) With respect to claimant’s leg pain, Dr. Pederson acknowledged the normal EMG but stated EMGs are “not 100% sensitive or specific.” (JE 15, p. 11) Thus, given claimant’s failed conservative care and the results of the discogram, Dr. Pederson opined that the recommended fusion surgery “is warranted for the injuries on 2-24-19 and 5-20-19.” (JE 15, p. 11) Based on this recommended surgery, Dr. Pederson did not believe claimant had reached MMI for his back. (JE 15, p. 11)

Dr. Pederson likewise did not believe claimant was at MMI for his hip; he instead recommended repeat injections or possible surgical corrections. (JE 15, p. 12)

In a follow-up letter to claimant’s counsel, Dr. Pederson addressed Dr. Aviles’ comments about claimant’s right-sided labral tear and opined that “[a] genetic condition

should then cause the right hip to have painful clicking and Mr. Stigleman should have been experiencing this painful clicking in both hips for his entire life." (JE 15, p. 13)

With this evidence in mind, I will now address whether claimant's ongoing complaints are related to claimant's work-related injuries. Turning first to claimant's hip, I find the opinions of Dr. Boulden and Dr. Aviles to be most persuasive. Like Dr. Boulden, I find the delay in the onset of claimant's left hip symptoms to be problematic, particularly because neither Dr. Harbach nor Dr. Pederson offered an explanation for that delay. Dr. Pederson attributed claimant's labral tear to the February 24, 2019 work injury, yet Dr. Pederson failed to explain why claimant did not begin complaining of hip symptoms until April of 2019. Dr. Pederson likewise failed to explain why claimant's labral tear could be the cause of his symptoms on the left when he had a similar labral tear on the right that was completely asymptomatic. Furthermore, Dr. Harbach did not provide treatment for claimant's left hip. While Dr. Troll indicated claimant's left hip complaints were work related, he was relying on an incorrect history that claimant's complaints began on the date of injury. For these reasons, I adopt the opinions of Dr. Boulden and Dr. Aviles and find insufficient evidence that claimant's ongoing hip complaints are causally related to either date of injury.

Having found insufficient evidence to causally connect claimant's ongoing hip complaints to his work-related injuries, I likewise find insufficient evidence to causally relate the claimed medical expenses for claimant's left hip to his work-related injuries.

With respect to claimant's back, I acknowledge much of claimant's objective testing was negative or unremarkable. For example, claimant's first MRI was unremarkable but for degenerative changes, and several physicians saw no significant changes in claimant's subsequent MRI. Claimant's EMG testing was likewise negative. Given the radiologist's interpretation of claimant's MRIs and the opinions of Dr. Boulden and Dr. Troll, both of whom reviewed both MRIs, I find there is insufficient evidence that claimant sustained a compression fracture or a progression of a compression fracture at L1 due to work-related injury on May 20, 2019.

Despite these negative tests, however, claimant has had significant and consistent symptoms in his lower back since February 24, 2019. The only testing that offered any explanation for these ongoing symptoms was the discogram, which revealed degenerative changes and annular tearing at L3 and L5. As noted, Dr. Pederson believed this was actually the most likely source of claimant's pain. Relying on this test and claimant's ongoing complaints, both Dr. Harbach and Dr. Pederson opined that claimant's work injuries resulted in an aggravation of claimant's pre-existing degenerative changes.

Notably, Dr. Boulden similarly opined that claimant sustained an aggravation of his degenerative disc disease—though it was also his opinion that claimant did not sustain any permanency. Given claimant's continued symptoms, however, I give little weight to Dr. Boulden's opinion regarding whether claimant has reached MMI or sustained any permanency.

Instead, relying on the opinions of Dr. Harbach and Dr. Pederson, I find claimant's work injuries caused an aggravation of his pre-existing lumbar degenerative disc disease. Relying on these same opinions, I find the recommended fusion surgery was likewise necessitated by claimant's work-related injuries. Thus, I find claimant has not yet reached MMI.

While I acknowledge claimant's EMG was negative, claimant reported radiating symptoms into his leg by his second visit with Ms. Cannon—symptoms that have persisted throughout the course of his treatment. Furthermore, Dr. Pederson explained that EMGs are not always 100 percent sensitive or specific.

While Dr. Boulden dismissed claimant's leg symptoms as a personal condition unrelated to his spine, this appeared to have been based, at least in part, on a misunderstanding of claimant's symptoms. As explained by claimant at hearing, he has never had "tics" as Dr. Boulden described; instead, he feels "electricity going down his leg." (Hrg. Tr., p. 117) This is consistent with the history given to Ms. Cannon as recently as days after the incident and to Dr. Pederson during the IME. (JE 2, p. 5 ("He will get some left inner leg numbness and tingling to the knee level"); JE 15, p. 1 ("Approximately a week after the incident, he gradually felt an electrical sensation radiating down the posterior left leg to the back of the knee.")) Thus, I adopt Dr. Pederson's opinion that claimant sustained left lumbar radiculopathy as a result of the February 24, 2019 injury and an aggravation of that radiculopathy as a result of the May 20, 2019 injury.

Having found claimant sustained a work-related aggravation of his pre-existing lumbar degenerative disc disease with left lumbar radiculopathy, I likewise find any treatment for these conditions to be causally connected to claimant's work-related injuries.

At the time of the hearing, claimant had not yet returned to work. (Hrg. Tr., p. 71) He testified, "I don't know what I can do with the restrictions I have assigned by Doctor Troll." (Hrg. Tr., p. 71) Again, these were the restrictions as set forth in the FCE that placed him in the light to light-medium physical demand level.

Of note, claimant's job with defendant-employer required occasional lifting of up to 300 pounds, frequent push/pull of up to 70 pounds, and occasional push/pull of 71 to 300 pounds. (Cl. Ex. 1) The FCE indicated claimant could perform lifting up to 25 pounds occasionally and pushing/pulling up to 35 pounds occasionally. (JE 12, p. 1) Thus, I find claimant was incapable at the time of the hearing of performing his regular job with defendant-employer without accommodation. I likewise find claimant was incapable of returning to employment substantially similar to his job with defendant-employer.

CONCLUSIONS OF LAW

The first issue to address is whether claimant's ongoing complaints are related to either or both of his work-related injuries.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

Based on the opinions of Dr. Boulden and Dr. Aviles, I found insufficient evidence that claimant's ongoing hip complaints are causally related to either date of injury. Thus, I conclude claimant failed to satisfy his burden to prove his ongoing hip complaints are related to his work injuries.

Based on this determination, I likewise conclude claimant failed to satisfy his burden to prove he is entitled to reimbursement or payment for medical expenses or mileage related to his left hip condition. Iowa Code § 85.27.

However, relying on the opinions of Dr. Harbach and Dr. Pederson, I found claimant's work injuries caused an aggravation of his pre-existing lumbar degenerative disc disease. I likewise found claimant sustained left lumbar radiculopathy as a result of radiculopathy as a result of the February 24, 2019 injury and an aggravation of that radiculopathy as a result of the May 20, 2019 injury. Thus, I conclude claimant satisfied his burden to prove his ongoing low back and leg complaints are related to his work injuries.

Having reached this conclusion, I likewise conclude claimant proved his entitlement to reimbursement or payment for medical expenses and mileage relating to treatment for his low back (including the recommended fusion surgery) and his leg. Iowa Code § 85.27.

The next issue to be decided is claimant's entitlement to a running award of temporary benefits starting September 27, 2019—the date of his termination. Iowa Code section 85.33(3) (2019) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Though Iowa Code section 85.33 was amended by the legislature in 2017 to require an employer's offers of temporary work and a claimant's refusal of suitable work to be in writing, the legislature added no provisions to address the impact of a claimant's termination on his entitlement to temporary benefits. As such, I conclude past precedent still applies.

The employer bears the burden to establish the prerequisites of Iowa Code section 85.33(3). Koehler v. American Color Graphics, File No. 1248489 (App. Feb. 25, 2005). Specifically, the employer must establish by a preponderance of the evidence that work was offered to the claimant, that the work was suitable, and that claimant intentionally refused the offered work. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012); Raymie v. JB Schott Family Farms, File No. 5041943 (App. Oct. 7, 2016); Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Woods v. Siemens Furnas Control, File Nos. 1303082, 1273249 (Arb. July 2002) (Final agency action by Commissioner Trier).

Termination by itself is not sufficient grounds to disqualify an employee from temporary benefits under Iowa Code section 85.33(3). Raymie, File No. 5041943 (App. Oct. 7, 2016); Terhark v. Hope Haven, File No. 5031853 (App. Feb. 26, 2013); Alonzo v. IBP, Inc., File No. 5009878 (App. Oct. 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App. Feb. 28, 2005). Instead, for misconduct to be tantamount to a refusal to perform suitable work, it must be "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The misconduct needs to be more egregious "than the type of inconsequential misconduct that employers typically overlook or tolerate." Id. While an employee "is not entitled to act with impunity toward the employer," the Commissioner has held that "not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action." Id. (citation

omitted).

As discussed, claimant was being offered and performing suitable work per Dr. Troll's restrictions through the date of his termination. However, I found the conduct that led to claimant's termination was not the type of conduct that would cause any employer to terminate any employee. I therefore conclude claimant's misconduct was not tantamount to a refusal to perform suitable work. Thus, claimant's termination was not sufficient grounds to disqualify claimant from temporary benefits. I conclude claimant is entitled to temporary benefits starting on his termination on September 27, 2019.

Both Iowa Code section 85.33(1) and section 85.34(1) provide that temporary benefits, whether temporary total disability (TTD) or healing period (HP), are to be paid until the employee has returned to work, has reached MMI, or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first.

In this case, I found claimant has not reached MMI, had not yet returned to work, and was incapable of performing his regular job with defendant-employer. Thus, none of the factors that terminate a claimant's entitlement to temporary benefits had occurred at the time of the hearing. I therefore conclude claimant is entitled to a running award of temporary benefits from the date of his termination until the first of the above-stated factors occurs.

Claimant also seeks reimbursement for costs as set forth in Claimant's Exhibits 6 through 9, which includes expenses related to the FCE performed at claimant's counsel's request, a vocational assessment, claimant's deposition transcript, and Dr. Harbach's report.

Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

I turn first to the costs of the FCE performed at claimant's counsel's request. (Cl. Ex. 6) This FCE was performed after the FCE that was endorsed and adopted by Dr. Troll. No physician recommended a second FCE, nor did I rely on it in my decision. While a physician's recommendation is not a prerequisite for taxation of costs (see Jasper v. Nordstrom, File No. 5063163 (Rehearing Dec., Oct. 16, 2020)), I am not persuaded that the second FCE was necessary or even helpful evidence. I therefore decline to assess defendants with any of the expenses related to the second FCE as set forth in Claimant's Exhibit 6.

Claimant also seeks reimbursement for expenses related to a vocational assessment in the amount of $1,545.00. (Cl. Ex. 7) I decline to tax defendants with this cost for several reasons. First, claimant asserted he was not at MMI and I did not find him to be at MMI. Thus, an industrial disability analysis was not performed, and I did not rely on the vocational assessment.

Furthermore, per the Iowa Supreme Court's instruction in Des Moines Area

Regional Transit Authority v. Young, expenses associated with examinations are not taxable as costs; only the cost associated with the preparation of the report shall be allowed. 867 N.W.2d 839, 846-847 (Iowa 2015).

Per the billing invoice for the vocational assessment in this case, “file review, vocational research and report” accounted for $1,275.00 of this bill, and the remainder was for an interview with claimant and e-mails. Unfortunately, this breakdown for “file review, vocational research and report” does not clarify how much time was spent on the report itself.

The Commissioner has previously found that expenses for physician's review of medical records are expenses associated with an examination and therefore cannot be taxed under rule 876 IAC 4.33(6). Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018). The Commissioner has also declined to tax any costs when invoices are not broken down to reflect which portion of charges are associated with reports versus other, non-taxable tasks. Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., 17, 2018); Reh v. Tyson Foods. Inc., File No. 5053428 (App. March 26, 2018). Thus, I decline to do so in this case as well. For these reasons, none of the expenses related to the vocational assessment as set forth in Claimant’s Exhibit 7 are taxed to defendants.

Claimant also requests reimbursement for a copy of his deposition transcript in the amount of $169.40. (Cl. Ex. 8) Claimant’s deposition transcript is an allowable cost under 876 IAC 4.33(2). Thus, defendants are assessed $169.40.

Lastly, claimant seeks reimbursement for expenses related to a report authorized by Dr. Harbach in the amount of $450.00. (Cl. Ex. 9) Again, however, per DART, only expense relating to the report itself can be taxed as costs. 867 N.W.2d at 846-847. The invoice from Dr. Harbach’s office indicates only $175.00 of this fee was attributable to his report; the remainder was attributed to a conference. Given the holding in DART, defendants are assessed $175.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant temporary benefits from September 27, 2019 and continuing until such time as there is a basis for ending such benefits by law.

All weekly benefits shall be paid at the stipulated rate of four hundred fifty-eight and 14/100 dollars ($458.14) per week.

Defendants shall be entitled to the stipulated credit against this award.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall pay directly to the medical provider, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for all causally related medical expenses and mileage contained in Claimant's Exhibits 3 through 5 and 10.

Pursuant to rule 876 IAC 4.33, costs are taxed to defendants in the amount of three hundred forty-four and 40/100 ($344.40).

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 12th day of November, 2020.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Greg Egbers (via WCES)
Anne Clark (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.