BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL NEWBURRY, Claimant, vs. THE LUTHERAN HOME FOR THE AGED ASSOCIATION, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 21000314.02 ARBITRATION DECISION Head Note Nos.: 1402.40, 1402.60, 1803.01, 2502, 2907, 3001

STATEMENT OF THE CASE

Michael Newburry, claimant, filed a petition in arbitration seeking workers' compensation benefits from The Lutheran Home for the Aged Association, employer, and Accident Fund General Insurance Company, as defendants. Hearing was held via Zoom on August 1, 2022.

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. The parties are now bound by their stipulations.

Claimant, Michael Newburry and Doug Wood were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits 1-8, claimant's exhibits 1-12 and defendant's exhibits A-G. On July 30, 2022, defendants filed "Defendants' Amended Hearing Exhibit List". Although this document is captioned as an exhibit list, the body of the document actually contains defendants' objections to claimant's exhibits 3, page 5 and 7, page 23. Under agency rule 876 IAC 4.19(3)(d), "[c]ounsel of record and pro se litigants shall file all written objections and motions to exclude evidence at least seven days before the hearing. Objections to exhibits are waived if they are not filed at least seven days before the hearing." I find defendants failed to timely file their written objections, therefore the objections are waived pursuant to agency rule 4.19(3)(d). All exhibits were received into evidence. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 16, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of permanency benefits claimant is entitled to receive as the result of the October 31, 2020 injury.
2. The appropriate weekly workers' compensation rate.
3. Claimant's entitlement to any underpayment of healing period benefits due to the rate dispute.
4. Whether defendants should be responsible for past medical expenses.
5. Whether claimant is entitled to reimbursement for an independent medical examination.
6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Michael Newburry, sustained an injury arising out of and in the course of his employment with Lutheran Home for the Aged Association ("Lutheran") on October 31, 2020. (Hearing Report, numbered paragraph 2)

Mr. Newburry began working for Lutheran in 2004. He has worked in the kitchen as dishwasher, prep cook, and cook. He also worked in housekeeping waxing and stripping floors. Additionally, he has worked as a floor aide. At the time of the work injury, he worked full-time as a certified nursing assistant (CNA). His duties included taking care of residents, lifting, transferring, bathing, and generally keeping the residents happy. He described the job as physically demanding. Prior to the October 31, 2020 work injury, Mr. Newburry worked the third shift weekend package from 6:00 p.m. to 6:30 a.m. He received additional pay for working the third shift. He also received additional pay for working the weekend shifts. At the time of his injury, Mr. Newburry's pay was $29.68 and $26.66 per hour depending on when he worked. Given Mr. Newburry's education level, the CNA position is the highest paid position claimant could obtain with Lutheran. (Tr. pp. 17- 24; Cl. Ex. 4)

The evidentiary record does include some treatment records that pre-date the work injury. On August 19, 2007, Mr. Newburry went to the Virginia Gay Hospital emergency room with pain in the left side of his back. He stated the pain began yesterday while lifting dry wall and he could not sleep due to muscle spasms. He rated his pain as 10 out of 10. He has never had any history of back injuries. The assessment was low back sprain. He prescribed Flexeril, Lortab and Demerol. He was to follow-up with Michelle Elgin, D.O. (JE1, p.1)

We now turn to the injury at bar. On October 31, 2020, Mr. Newburry was helping transfer a resident when he felt extreme pain in his back that radiated down his leg into his foot. He reported the injury to Lutheran. (Tr. pp. 27-28)

On November 6, 2021, Mr. Newburry went to the emergency room at Virginia Gay Hospital with complaints of increased low back pain that worsened when lifting at work. He also had increased numbness and weakness in his lower extremities. Mr. Newburry was discharged and encouraged to obtain an MRI. (JE1, pp. 3-4)

On December 31, 2020, an MRI of the lumbar spine was performed at Corridor Radiology. The impression was moderate to large left paracentral disc protrusion at L3-4 which results in severe spinal canal stenosis and mild bilateral foraminal narrowing at L3-4. (JE2, p. 1)

Mr. Newburry saw Chelsea R. Peoples, PA-C at Virginia Family Medical Clinic on November 2, 2020. He presented with back pain and right hip pain down to his right calf which started on Saturday morning, October 31, 2020. He began having low back pain with the radiation of shooting and burning type pain down to his right leg and right foot when he was transferring a patient on Saturday morning. His pain became so severe that he could not stand on his right leg toward the end of the shift. He stayed home from work yesterday. His pain seems to be improving today and he notes only a slight radiation of pain from his right leg. He has no concern with bearing his weight on his right leg today. The assessment was acute right-sided low back pain with right-sided sciatica. Mr. Newburry declined imaging and medication at that time. He was given a note to go back to work Wednesday night. (JE3, pp. 1-4)

Mr. Newburry was 20 minutes late for his physical therapy appointment on November 16, 2020. The physical therapist explained there was not enough time to conduct an evaluation and he would need to reschedule. (JE5, p. 1)

On November 20, 2020, Mr. Newburry saw Erica L. Silbernagel, D.O., for evaluation of low back pain, lower than his previous pain. Mr. Newburry did return to work but says he “threw out” his back completely after rolling a patient at Lutheran on November 13, 2020. I saw him on November 16 and referred him to physical therapy, but he arrived 25 minutes late to his appointment. His session was rescheduled for later in the week, but he did not keep that appointment. He reports that he reinjured himself on November 18, 2020, when he lifted a 30-pound box at home. He immediately felt pain throughout his low back, both of his legs went numb, and he dropped the box. It was the lateral sides of his legs that felt tingly, not the groin or medial legs. Previously, his pain was around L1, but now the pain is more at L5 level. Now the pain persists more on the right and he has a lot of pressure in his low back. The assessment was acute midline low back pain without sciatica. He was referred to physical therapy. He was released to return to work with restrictions. (JE3, pp. 5-7)

On November 21, 2020, Mr. Newburry saw Brian W. Meeker, D.O., for back pain. He reports a lot of aches, pain, and pressure. He also reports back pain that radiates

down his bilateral legs. He worked yesterday and stated that his knees started to buckle. The assessment was acute right-sided low back pain with right-sided sciatica. (JE3, pp. 8-10)

Mr. Newburry called the Vinton Family Medical Clinic on November 24, 2020 to request a copy of his days off work. The nurse advised Mr. Newburry that Dr. Meeker did not say anything about keeping him off work. He was supposed to attend physical therapy yesterday and he did not. Dr. Meeker had no intention of giving Mr. Newburry any restrictions or additional time off work. Because Mr. Newburry already saw Dr. Silbernagel and Chelsea for his problems, he was advised that he needs to stick with one provider for work notes. (JE4, p. 1)

On February 10, 2021, Mr. Newburry saw Chad D. Abernathey, M.D. He had a four-month history of low back and bilateral leg pain and paresthesia. Mr. Newburry reported that his symptoms alternate from left to right. Conservative treatment to date was unsuccessful so he was referred to Dr. Abernathey for neurosurgical opinion. Dr. Abernathey noted the MRI of the lumbosacral spine demonstrated a broad-based L3-4 disc extrusion with primary projection to the left. Mr. Newburry advised Dr. Abernathey that he wished to proceed with surgery. (JE6, pp. 1-2) Dr. Abernathey issued a missive to defendants. He stated his diagnosis is L3-4 disc extrusion consistent with the work-related incident of October 31, 2020. He felt the work-related incident of twisting and bending while lifting a resident was consistent with that diagnosis. Dr. Abernathey said Mr. Newburry would not reach maximum medical until 6 months from the date of definitive treatment with surgical intervention. He could return to work 6-8 weeks following surgery. (JE6, p. 1)

On March 16, 2021, Dr. Abernathey performed a left L3-L4 partial hemilaminectomy, diskectomy. The postoperative diagnosis was left L4 radiculopathy, left L3-L4 disk extrusion. (JE6, p. 4) Following surgery, Mr. Newburry attempted to return to work as a CNA, but was unable to perform the work due to his physical condition. He tried to perform the CNA work for approximately one month. (Tr. pp. 60-61)

On July 27, 2021, Mr. Newburry returned to Vinton Family Medical Clinic for back pain and depression. He was status post lumbar micro-discectomy on March 16, 2021 with Dr. Abernathey. He continued to have back pain and sleeping difficulty due to pain. His pain had been worsening since his surgery. He reported pain in his bilateral hips and he experienced cramps from his right calf to his right thigh. He stated he needs to take frequent breaks while driving. His pain was exacerbated by bending, squatting, and twisting. He works as a CNA and notes his job has been increasingly difficult. He has been back to his regular duties for 2 weeks. He asked his employer if there is a less strenuous job available, but he has been denied any other positions. Mr. Newburry reported depression since his pain has been worsening. (JE4, pp. 2-3)

On September 3, 2021, Dr. Abernathey issued a missive to defendants. Dr. Abernathey stated based upon the AMA Guides for chronic pain, decreased range of

motion of the lumbosacral spine, previous disc extrusion and subsequent surgery, he considers Mr. Newburry to have a 7 percent whole body impairment rating. He considered Mr. Newburry to be at maximum medical improvement (MMI) as of September 3, 2021. He did not assign any permanent restrictions from a neurosurgical standpoint. (JE6, p. 5)

Mr. Newburry returned to Vinton Family Medical Clinic on September 20, 2021. He reported back pain and sleeping difficulty. The diagnoses were chronic midline low back pain without sciatica, chronic bilateral low back pain without sciatica, and acute right-sided low back pain with right-sided sciatica. His back pain was worse on the left side. Last week he felt some pain radiate down his left leg. Physical therapy recommended a 2-week break from physical therapy to determine if his back pain had worsened due to therapy. His back pain also worsened at work. He has only been able to work 7.75 hours per day. He was noted to have a depressed mood. He was referred to pain management. (JE4, pp. 4-8)

Dr. Silbernagel saw Mr. Newburry on October 19, 2021, for low back pain greater than 1 year. He reported that he went to the pain clinic appointment but was told workers' compensation had cancelled the appointment because he had reached MMI. Mr. Newburry wants to know what else may be done. He continues to have low back pain at the level of L1 extending down to L5. He reports the pain wraps around his hips and sometimes goes down into the groin. He also has numbness on his bilateral lateral thighs. The impression was chronic bilateral low back pain without sciatica. Dr. Silbernagel recommended he see physical medicine and rehabilitation. (JE4, pp. 9-11)

Mr. Newburry went to the emergency room on November 21, 2021, with chief complaint of leg pain. He noted this was a new complaint with a sudden onset; associated symptoms include back pain and weakness. In March he was at work and felt his right knee pop. He has not sought further opinion, but he is now walking with a cane because his right knee feels a little more unstable and he feels his legs are weak. The impression was acute pain of the right knee and weakness of both lower extremities. (JE7, pp. 1-4)

At the request of the insurance carrier, Mr. Newburry returned to Dr. Abernathey on December 6, 2021. He reported low back pain. He continued to work in a light duty capacity. Dr. Abernathey noted that Dr. Silbernagel ordered an epidural steroid injection; however, the insurance carrier canceled that evaluation. Dr. Abernathey did not recommend any aggressive neurosurgical management. He felt that a pain clinic assessment was a reasonable approach if his symptoms persist or worsen. Dr. Abernathey stated he would be available for further neurosurgical consultation if so desired. (JE6, p. 6)

Mr. Newburry underwent a functional capacity evaluation (FCE) with Daryl Short, DPT at WorkWell on April 19, 2022. Mr. Newburry was found to have given consistent effort throughout the testing. The FCE placed him in the sedentary to light category of physical demand up to 15 to 20 pounds on an occasional basis. He recommended

limiting elevated work and/or reaching at shoulder height and higher with material and non-material handling activities to an occasional basis. He should limit stand/walk combined for up to 35 percent of the day. Mr. Newburry should also be allowed to change positions between sitting, standing, and walking as needed. (Cl. Ex. 11)

On May 2, 2022, Dr. Abernathey signed a letter drafted by claimant's counsel. By signing the letter, Dr. Abernathey indicated that the summary in the letter accurately reflected his opinions within a reasonable degree of medical certainty. Dr. Abernathey reiterated that Mr. Newburry reached MMI as of September 3, 2021 and that he sustained 7 percent impairment of the whole person based upon the AMA Guides to the Evaluation of Permanent Impairment. He noted that during activity Mr. Newburry continues to experience pain, numbness, and weakness in his legs. Dr. Abernathey adopted the permanent restrictions as set forth in the Functional Capacity Evaluation completed at Work Well on April 19, 2022. (Cl. Ex. 7, p. 22)

At the request of the defendants, claimant underwent a Functional Capacity Evaluation (FCE) at E3 Work Therapy Services on May 26, 2022. The report states that Mr. Newburry failed to give maximum voluntary effort during the FCE and it was not possible to determine safe physical capabilities. The overall classification of effort was invalid. (Cl. Ex. G)

At the request of his attorney, Mr. Newburry underwent an Independent Medical Evaluation (IME) with Stanley J. Mathew, M.D. on June 16, 2022. Dr. Mathew's impression included chronic low back pain, status post lumbar spine surgery laminectomy, lumbosacral radiculopathy, gait and balance dysfunction, lower extremity weakness, and chronic pain related depression. He opined that those diagnoses are a direct result of the work injury that occurred on October 31, 2020. Dr. Mathew stated that under the Guides, Fifth Edition, specifically Table 15-3, he assigned 20 percent whole person impairment rating. He also opined that Mr. Newburry's right lower extremity pain and weakness is a direct result of the October 31, 2020 accident. He stated that Mr. Newburry has a lumbosacral radiculopathy which is nerve irritation and damage causing weakness to his lower extremities. Dr. Mathew recommended avoiding lifting more than 20 pounds, prolonged standing, walking, bending, lifting, squatting, and to avoid heights and ladders. He believes Mr. Newburry would benefit from a chronic pain specialist including oversite of therapy, medication management, aqua therapy, injection therapies and pain psychology due to the development of chronic pain syndrome. He placed Mr. Newburry at MMI as of March 16, 2022, which is one year post surgery. (Cl. Ex. 8, pp. 24-28)

On June 22, 2022, Dr. Abernathey signed a letter authored by defendants. His signature indicates that he agreed with the statements in the letter. Dr. Abernathey opined within a reasonable degree of medical certainty that Mr. Newburry did not require any permanent restrictions. (Def. Ex. F, p. 1)

On July 1, 2022, the employer sent a letter to Mr. Newburry via certified mail. The letter stated that Dr. Abernathey opined that Mr. Newburry does not require any

restrictions. The employer advised Mr. Newburry that his job as a CNA weekend package of 36 hours per week 6:00 a.m. to 6:30 p.m. Friday, Saturday, and Sunday at $27.46 per hour is still available to him. The letter advised Mr. Newburry, "[i]f you expect to appear, please report to the Vinton Lutheran Home at 1301 2nd Ave. Vinton, Iowa 52349, on Friday July 15, 2022, at 6:00 a.m." (Def. Ex. E, p. 9)

On July 8, 2022, Dr. Abernathey signed a letter drafted by claimant's counsel. By signing the letter, Dr. Abernathey indicated that the summary in the letter accurately reflected his opinions within a reasonable degree of medical certainty. Dr. Abernathey agreed Mr. Newburry should adhere to the restrictions in the sedentary to light category. Those restrictions are based the April 19, 2022 Work Well FCE. Dr. Abernathey opined that Mr. Newburry is not able to return as a CNA because he is unable to meet the physical demands of the position. (Cl. Ex. 7, p. 23)

Also on July 8, 2022, claimant's counsel sent a letter to defense counsel advising that Mr. Newburry was physically unable to perform the offered work and therefore cannot accept the offer of work. The letter states this was based on the FCE and the opinion of the treating physician, Dr. Abernathey. (Cl. Ex. 12, p. 49) The record is void of any response from the defendants.

The first issue to be addressed is the nature and extent of permanent disability Mr. Newburry sustained as the result of the work injury. There are two physicians who have assigned impairment ratings to Mr. Newburry.

On September 3, 2021, Dr. Abernathey stated that based upon the AMA Guides for chronic pain, decreased range of motion of the lumbosacral spine, previous disc extrusion and subsequent surgery, he considered Mr. Newburry to have a 7 percent whole body impairment rating. Dr. Abernathey considered Mr. Newburry to be at MMI as of September 3, 2021. (JE6, p. 5) He reiterated these opinions in May 2022. (Cl. Ex. 7, p. 22) Mr. Newburry's IME doctor, Dr. Mathew, assigned 20 percent whole person impairment pursuant to the AMA Guides, Fifth Edition, Table 15-3. Dr. Mathew placed Mr. Newburry at MMI as of March 16, 2022, which is one year post surgery. (Cl. Ex. 8, pp. 24-28) Based on the opinions of these two physicians, I find Mr. Newburry did sustain permanent functional impairment of his body as a whole as the result of the injury.

There are varying opinions regarding appropriate permanent restrictions for Mr. Newburry as the result of the work injury. On May 2, 2022, Dr. Abernathey adopted the permanent restrictions as set forth in the Functional Capacity Evaluation (FCE) completed at Work Well on April 19, 2022. (Cl. Ex. 7, p. 22) In June 2022, Dr. Abernathey indicated Mr. Newburry did not require any permanent restrictions. In July 2022, Dr. Abernathey indicated that Mr. Newburry should in fact adhere to the restrictions in the sedentary to light category as set forth in the FCE conducted at Work Well. Although Dr. Abernathey's opinions have flip-flopped, he ultimately adopts the FCE restrictions. Dr. Mathew recommended avoiding lifting more than 20 pounds, prolonged standing, walking, bending, lifting, squatting, and avoiding heights and

ladders. (Cl. Ex. 8, p. 27) I find the restrictions of Dr. Abernathey, the restrictions set forth in the Work Well FCE, and the restrictions of Dr. Mathew are all consistent with one another. I find that as the result of the work injury, Mr. Newburry has permanent restrictions as set forth in the Work Well FCE. I further find, based on these restrictions and the opinion of Dr. Abernathey, that Mr. Newburry is not physically capable of returning to work as a CNA. (Cl. Ex. 7, p. 23)

The parties disagree on the type of permanent partial disability benefits claimant should receive as the result of the work injury. Defendants assert that because they offered Mr. Newburry full-time employment as a CNA at the same or greater wages he was earning at the time of the injury, his award of permanent partial disability should be limited to the impairment rating. Claimant does not dispute that the job offered was at the same or greater wages than what he was earning at the time of the injury. Rather, claimant contends that because he is not physically capable of performing the offered work, he is entitled to an award of industrial disability.

I find at the time of the hearing Mr. Newburry was employed by Lutheran, but he was earning less wages then he was at the time of the injury. I further find that after the injury, Lutheran offered Mr. Newburry a CNA job that his physical restrictions prevent him from performing. The treating physician specifically stated that Mr. Newburry is not capable of returning to work as a CNA. The defendants' argument that offering Mr. Newburry work as a CNA qualifies as an offer of work for which he would receive the same or greater wages is not persuasive. Clearly, claimant's work restrictions prevent him from being able to perform the work offered by the employer. I conclude that the defendants did not make an offer of work which would result in the employee receiving the same or greater wages then he received at the time of the injury. Thus, I conclude claimant's compensation shall not be based only upon the functional impairment; rather, he is entitled to an award of industrial disability.

At the time of hearing Mr. Newburry was 37 years old. He obtained his GED in 2003. When Mr. Newburry was still in school, he attended some special education classes due to difficulty learning and focusing. His cumulative grade point average of .700 and class rank of 267 out of 272 demonstrates that Mr. Newburry struggled in school. In 2006 he obtained his nursing assistant certificate through Kirkwood Community College. (Tr. pp. 15-17; Cl. Ex. 6, pp. 20-21)

Prior to working at Lutheran, Mr. Newburry worked at Biaggi's as a prep cook. His duties included portioning out ingredients, filleting fish, and butterflying shrimp. He was paid $9.00 per hour. His work history also includes working at Kerry Ingredients as a forklift operator. He worked full-time and was paid $9.00 per hour. He also worked at McDonald's preparing food. He worked full-time and was paid $6.10 per hour. (Tr. pp. 23-26) Given his permanent restrictions I find it is likely Mr. Newburry could not return to many of his prior jobs.

At the time of his injury, Mr. Newburry's pay at Lutheran was $29.68 and $26.66 per hour working the weekend overnight shift differential. I find that the pay Mr.

Newburry was earning at the time of his injury was the highest pay he had ever received during his employment history. Mr. Newburry does not believe he could physically return to work as a CNA. He does not believe he could perform the required walking, standing, lifting 50 pounds, sitting for long periods of time, frequent reaching, bending, stretching, or finger dexterity. He agrees with Dr. Abernathey that he should be placed in the sedentary to light work category. He also agrees with Dr. Abernathey that he is not physically capable of performing the work of a CNA. The record is void of any doctor placing a limit on the number of hours Mr. Newburry works per day. (Tr. pp. 35-37)

At the time of the hearing, Mr. Newburry was employed at Lutheran as a floor aide working at the front desk. He is paid $17.36 per hour and works approximately 12 hours per week. A review of the post-injury paystubs from April 2022 through June 2022 reveals Mr. Newburry's gross earnings range from $134.00 to $407.00 per pay period. Mr. Newburry testified that recently he has not been working due to his pain, numbness, and tingling. He has pain in his mid-back and down his hips and legs. Mr. Newburry testified that he uses a cane every time he walks. The record is void of any medical provided prescribing or recommending he use a cane every time he walks. (Tr. p. 38, 59; Cl. Ex. 5)

Mr. Doug Wood testified live at the hearing. Mr. Wood is the administrator for the Lutheran facility where Mr. Newburry is employed. The primary person who dealt with Mr. Newburry's restrictions was the director of nursing. Mr. Wood testified that since the injury Mr. Newburry would often leave his shifts early; he typically would only work for approximately two hours per day, even though he was scheduled for 12-hours per day. He had not seen Mr. Newburry utilize a cane prior to the day of the hearing. Lutheran is willing to have him work full-time as a floor aide. Mr. Wood admitted that he did not know what Mr. Newburry's medical condition is or what jobs he might be capable of performing. (Tr. pp. 63-71)

At the time of the injury claimant was paid approximately $26.66 or $29.68 per hour, depending on when he worked. According to the evidence this is the highest weekly rate that he ever received. Although he cannot return to his prior job no medical provider has opined that he cannot work. I find Mr. Newburry's restrictions preclude him from a significant number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disability. I find he has demonstrated that he has a limited work history with limited skills. However, I also find that he could pursue alternate employment if he so desired.

I find that Mr. Newburry has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, he has significant restrictions and has lost access to a significant portion of his pre-injury employment opportunities.

Considering Mr. Newburry's age, proximity to retirement, limited educational background, limited employment history, limited ability to retrain, length of healing period, permanent impairment, permanent restrictions, and the other industrial disability

factors set forth by the Iowa Supreme Court, I find that he has sustained a 60 percent loss of future earning capacity as a result of his work injury with the defendant employer.

We now turn to the appropriate commencement date for the permanency benefits. Based on the opinion of Dr. Abernathey, I find it was medically indicated that MMI from the injury had been reached and that the extent of loss or percentage of permanent impairment could be determined by use of the Guides to the Evaluation of Permanent Impairment as of September 3, 2021. (JE6, p. 5) Thus, I find permanent partial disability benefits shall commence on September 3, 2021.

Regarding the issue of rate, I make the following findings. The dispute between the parties centers on how to calculate Mr. Newburry's gross average weekly wages. Based on the pay stubs in evidence, I find that Mr. Newburry was issued paychecks on a semi-monthly pay period basis. I further find that the amount he was paid was based on the hours he worked, and he was paid different hourly rates depending on when he worked. I find that the amount Mr. Newburry was paid for each pay period varied. The parties disagree on whether the pay period ending October 25, 2020, should be included in the rate calculation. A review of the pay stubs in evidence demonstrates that during this pay period Mr. Newburry worked 52.75 hours; this is the only pay period where claimant worked less than 60 hours. (Cl. Ex. 4; Def. Ex. B, p. 1) I find that the week of October 25, 2020, does not fairly reflect claimant's customary earnings and therefore should not be included in the calculation. These findings will be applied to the appropriate law below.

According to the hearing report, claimant was seeking payment of past medical expenses as set forth in claimant's exhibits 1, 9, and 12. However, I find that those exhibits do not contain any medical bills other than the IME bill which will be addressed below. At the time of hearing, claimant's counsel clarified that exhibit 12 was withdrawn. There is no mention of past medical expenses in claimant's post-hearing brief. Thus, I find claimant has not demonstrated entitlement to payment of any past medical expenses as the result of these proceedings. (Tr. pp. 7-8; Cl. Ex. 1 & 9; Hearing Report)

We now turn to the issue of whether Mr. Newburry is entitled to reimbursement in the amount of $2,500.74 for the IME conducted by Dr. Mathew on June 20, 2022. (Cl. Ex. 9, p. 32) Mr. Newburry sustained a compensable work injury. I find the defendants obtained an impairment rating which Mr. Newburry felt was too low prior to the time of Dr. Mathew's IME.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. I find that Mr. Newburry was generally successful in his claims and that an assessment of costs against the defendants is appropriate. Claimant is seeking an assessment of costs totaling $103.00 as set forth in his exhibit 1. I find that the filing fee

is an appropriate cost under subsection 7. Thus, defendants are assessed costs totaling $103.00.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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).

The parties have stipulated that claimant sustained an injury that arose out of and in the course of his employment and that the injury resulted in permanent disability. Because claimant sustained an injury which extends into the body as a whole, he should be compensated pursuant to Iowa Code section 85.34(2)(v). The central dispute in this case centers around the 2017 amendments to the Iowa Workers' Compensation Act. Prior to 2017, a claimant who sustained permanent disability to his body as a whole was automatically compensated on an industrial disability basis; this changed with the 2017 amendments.

The amended law states:

> In all cases of permanent partial disability other than those described or referred to in paragraphs 'a' through 'u', the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears

> in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. 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.

Iowa Code section 85.34(2)(v)(emphasis added).

Claimant contends he was not offered a job he was physically capable of performing and therefore should be compensated on an industrial disability basis. Defendants contend they offered him work at the same or greater pay he was earning at the time of the injury and therefore his award of permanent disability should be based only upon his functional impairment resulting from the injury. Their dispute centers on the language from the 2017 amendment. Neither party provides any authority to support their position.

The Iowa Supreme Court has stated that a statute is ambiguous when reasonable persons could disagree as to its meaning. See Chavez v. MS Technology 972 N.W.2d 662 (Iowa 2022)(citing Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016)). Here, Iowa Code section 85.34(2)(v) is ambiguous because reasonable persons disagree on the statutory meaning of "offered work."

The undersigned recognizes that the "interpretation of the workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency." Schutjer, 780 N.W.2d at 558 (citation and internal quotation marks omitted). Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012). However, to determine the nature of the permanency benefits claimant is entitled to receive, it is first necessary to determine whether the employee was offered work for which he would receive the same or greater wages.

Based on the above findings of fact, I found that claimant was physically restricted from performing the work that was offered to him by the employer. Claimant contends he was not offered work in the proper sense of the word because the employer failed to take his physical restrictions into account. Claimant further argues that because he was not offered work with similar or greater wages that he was physically able to perform he was not offered a legitimate return to work by the employer.

Defendants do not contend that claimant was capable of performing the work he was offered. Rather, defendants argue that because they offered claimant full-time work with the same hours and wages he earned at the time of the injury his permanent disability should be based only upon his functional impairment rating.

The undersigned acknowledges that an argument may be made that the plain language of the statue does not specifically state that claimant must be capable of performing the offered work. However, the adoption of the defendants' application of the law would generate absurd results. Such an application would allow an employer to evade any liability for industrial disability merely by offering the employee a job for which the employee would receive equal or greater pay even though the employee is not capable of performing or perhaps not even qualified to perform the offered job. The Iowa Supreme Court has stated that interpreting statutes requires an assessment of the entire statute to ensure interpretation is harmonious with the statutes as a whole rather than assessing isolated words or phrases. Doe v. State, 943 N.W.2d 608, 610 (Iowa 2020)(citations omitted). Section 85.34(2)(v) specifically states if the employee "returns to work or is offered work . . ." The sentence in question specifically states if the employee returns to work or is offered work, clearly the language contemplates the employee actually returning to work and performing the work. The statutory language implies that the employee must be capable of performing the work he is offered. In this case, the employer offered work that claimant is restricted from performing. Clearly, claimant's work restrictions prevent him from being able to perform the work offered by the employer. I conclude that the offer made by the defendants is not an offer of work as contemplated by Iowa Code section 85.34(2)(v). Thus, I conclude claimant's compensation shall not be based only upon the functional impairment; rather, he is entitled to an award of industrial disability.

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

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

Based on the above findings of fact, I conclude that he has sustained a 60 percent loss of future earning capacity as a result of his work injury with the defendant employer. Compensation shall be paid in relation to 500 weeks as the disability bears to

the body as a whole. Section 85.34(2)(v). Thus, claimant has demonstrated entitlement to 300 weeks of permanent partial disability benefits.

Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the Guides to the Evaluation of Permanent Impairment. Section 85.34(2). Based on the opinion of Dr. Abernathey, I conclude it was medically indicated that maximum medical improvement from the injury had been reached and that the extent of loss or percentage of permanent impairment could be determined by use of the Guides to the Evaluation of Permanent Impairment as of September 3, 2021. (JE6, p. 5) Thus, I conclude permanent partial disability benefits shall commence on September 3, 2021.

We now turn to the issue of claimant's weekly workers' compensation rate. There is a dispute among the parties on how to calculate claimant's average weekly earnings. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. Weekly earnings are defined by this section as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employments. The various subsections of section 85.36 set forth methods of computing weekly earnings depending on the type of earnings and employment.

Mr. Newburry's paychecks were issued on a semi-monthly basis. Because he was paid on an hourly basis, his pay varied depending on the hours he worked in any given pay period. In this case, both parties contend that claimant's rate should be calculated pursuant to subsection 6. This subsection states:

> In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code section 85.36(6).

Claimant contends his rate calculation consists of fourteen weeks of pay to calculate the rate due to what he contends is the biweekly nature of his paychecks. (Cl.

Ex. 3, p. 5; claimant's post-hearing brief, p. 12) Claimant utilizes the pay periods ending July 10, 2020 through October 25, 2020, but excludes the pay period ending August 25, 2020 as unrepresentative. Claimant arrives at an average weekly wage of $1,114.50. (Cl. Ex. 3, p. 5)

Defendants disagree with claimant's rate calculation for a couple of reasons. First, defendants contend the week claimant excluded from his rate calculation is representative and should be included. The pay period in question ends on October 25, 2020. (Cl. Ex. 4, p. 14) According to defendants' rate calculation, claimant worked 52.75 hours; this is the only pay period where claimant worked less than 60 hours. (Def. Ex. B, p. 1) I conclude that the pay period ending on October 25, 2020, does not fairly reflect claimant's customary earnings and therefore should not be included in the calculation. Thus, I conclude the weeks included in claimant's rate calculation are appropriate.

Second, defendants contend that claimant is paid bimonthly and therefore, claimant's calculation incorrectly assumes that each pay period was exactly two weeks. Thus, in their calculation defendants use different weeks than the claimant in their calculation and they contend that they "correctly divided the average weekly wage by 13.1429 because the earning from July 26, 2020 through October 25, 2020, occurred over 92 days, not exactly 14 weeks." (Def. Ex. B, p. 1; Def. post-hearing brief, p. 11) Defendants arrives at an average weekly wage of $953.32. (Def. Ex. B, p. 1)

While I do not agree with the weeks defendants used to calculate claimant's average weekly wage, I do agree that his average weekly wages should not simply be divided by 14 because this results in an artificially inflated rate. I conclude that claimant's calculation of the average weekly wage is correct. However, I further conclude that the average weekly wage should be based on the exact number of weeks utilized. In this case, claimant's total average weekly wages of $15,602.98 are based on pay periods from June 26, 2020 through August 10, 2020 and August 26, 2020 through October 25, 2020 which consists of 15.286 weeks. Thus, I conclude claimant's average weekly wage is $1,020.74. Claimant is married and entitled to 4 exemptions which results in a weekly workers' compensation rate of $682.21.

It should be noted that all of claimant's weekly benefits shall be based on the weekly workers' compensation rate of $682.21. Prior to hearing the defendants paid claimant weekly benefits at lesser rates. Defendants shall make up any underpayment of weekly benefits, plus interest. Iowa Code section 85.30.

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

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

Based on the above findings of fact, I conclude claimant has failed to demonstrate entitlement to payment of any past medical expenses via this proceeding.

Claimant is seeking reimbursement for his IME. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Based on the above findings of fact, I conclude that the prerequisites of section 85.39 were met. In their post-hearing brief defendants contend the claimant is not entitled to reimbursement of the full amount of the IME because the fees charged are not reasonable. However, in the hearing report the defendants stipulated that medical providers would testify to the reasonableness of their fees and that defendants were not offering any contrary evidence. (Hearing Report, numbered paragraph 8(d)). Thus, I conclude the fee is reasonable and claimant is entitled to reimbursement for the IME in the amount of $2,500.74.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of six hundred eighty-two and 21/100 dollars ($682.21).

Defendants shall pay three hundred (300) weeks of permanent partial disability benefits commencing on September 3, 2021.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay any underpayment of all previously paid weekly benefits.

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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for the IME in the amount of two thousand five hundred and 74/100 dollars ($2,500.74).

Defendants shall reimburse claimant costs in the amount of one hundred three and no/100 dollars ($103.00).

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 9th day of January, 2023.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Connor Mulholland (via WCES)

Laura Ostrander (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.