BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VERNON LOWE, Claimant, vs. MIDWEST WRECKING CO., LTD, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5064812 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1402.50

Claimant Vernon Lowe filed a petition in arbitration on August 24, 2018, alleging he sustained injuries to his head, left shoulder, ribs, and body as a whole while working for the defendant Midwest Wrecking Co., Ltd. ("Midwest Wrecking") on September 20, 2017. Midwest and its insurer, the defendant, Accident Fund General Insurance Company ("Accident Fund"), filed an answer on September 17, 2018, denying Lowe sustained a work injury.

An arbitration hearing was held on December 11, 2019, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Emily Anderson represented Lowe. Lowe appeared and testified. Attorney Laura Ostrander represented Midwest Wrecking and Accident Fund. John Clarke, the owner of Midwest Wrecking, appeared and testified. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 16 and A through H were admitted into the record. The record was held open through January 17, 2020, for the receipt of post-hearing briefs. Midwest Wrecking and Accident Fund did not timely file their brief, or request an extension of the briefing from the undersigned, and instead filed their brief on January 18, 2020. After I contacted the parties Lowe's attorney reported she had agreed to an extension of the briefing deadline. I reopened the record for the receipt of the brief and closed the record on January 18, 2020.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. Midwest Wrecking and Accident Fund asserted

the affirmative defenses of lack of timely notice under Iowa Code section 85.23 and that the injury did not arise out of or in the course of Lowe's employment, as the injury occurred off premises during an unpaid break when Lowe was not engaged in any work-related activity. Midwest Wrecking and Accident Fund waived all other affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Midwest Wrecking and Lowe at the time of the alleged injury.

2. If the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is April 14, 2018.

3. At the time of the alleged injury Lowe's gross earnings were $301.00 per week, he was single and entitled to one exemption, and the parties believe the weekly rate to be $201.69.

4. The costs set forth in Exhibit 13 have been paid.

ISSUES

1. Did Lowe sustain an injury which arose out of and in the course of his employment with Midwest Wrecking on September 20, 2017?

2. Is Lowe's claim barred by lack of timely notice under Iowa Code section 85.23?

3. Is the alleged injury a cause of temporary disability during a period of recovery?

4. Is the alleged injury a cause of permanent disability?

5. Is Lowe entitled to temporary disability benefits from September 20, 2017 through April 13, 2018?

6. If the injury is found to be a cause of permanent disability, is the disability an industrial disability?

7. Is Lowe entitled to recover the medical expenses set forth in Exhibit 12?

8. Is Lowe entitled to recover the cost of an independent medical examination under Iowa Code section 85.39?

9. Is Lowe entitled to alternate medical care under Iowa Code section 85.27?

10. Should costs be assessed against either party?

FINDINGS OF FACT

Lowe lives in Davenport, Iowa with his girlfriend. (Transcript, page 52) Lowe dropped out of school when he was a junior in high school. (Tr., pp. 53-54; Exhibit 5, p. 22) Throughout his schooling Lowe attended special education. (Tr., p. 54) At the time of the hearing Lowe was sixty-one. (Tr., p. 52)

After leaving high school Lowe worked in a carnival as a motorcycle stuntman. (Tr., pp. 84-85) While performing a stunt Lowe fell thirty-eight feet and landed on his feet, injuring his ankles. (Tr., pp. 85, 92) Lowe did not injure his head in the accident. (Tr., p. 85)

As a teenager, Lowe attended school to become a heavy equipment operator and he later attended truck driving school. (Tr., p. 54) Lowe worked in heavy equipment for twelve or thirteen years. (Tr., p. 55) Lowe worked for a business cleaning semi tractor trailers, for a foundry, and for salvage yards, pulling parts from cars. (Tr., pp. 69-70; Ex. F, p. 6; Ex. 5, p. 24)

In 1989 Lowe was hit by a car when he was riding a motorcycle. (Tr., p. 90) Lowe had surgery on his left hand and he was in a coma for two-and-a-half or three-and-a half months. (Tr., p. 90) Following the accident Lowe received speech therapy. (Tr., p. 90) Lowe reported he did not have any memory issues or permanent restrictions after the 1989 accident. (Tr., p. 91) There is no evidence Lowe had any ongoing medical issues or problems with cognition or speech following the 1989 accident.

Clarke is the owner and manager of Midwest Wrecking. (Tr., p. 9) Midwest Wrecking operates an auto salvage yard. (Tr., p. 62; Ex. 9, p. 68) Clarke has worked for Midwest Wrecking since 1976. (Tr., p. 33; Ex. 9, p. 68) Clarke also owns several residential properties in the Davenport area. (Tr., p. 10; Ex. 9, pp. 68-69) At the time of the hearing Midwest Wrecking had four employees, Shawn Sird, Michael Cole, Sandy Chrissinger, and Clarke. (Tr., pp. 9-10) Chrissinger has worked for Midwest Wrecking since 1985 and she has been Clarke's girlfriend since that time. (Exs. 8, p. 45; 9, p. 76)

Clarke hired Lowe to pull car parts at the salvage yard and to perform maintenance work on Clarke's residential properties. (Tr., pp. 12-13, 62) Lowe worked for Clarke thirty-five to forty hours per week and he earned $7.25 per hour. (Tr., pp. 61-62) At the salvage yard Lowe pulled car parts for customers. (Tr., p. 62) Lowe also replaced tires and rims on vehicles for customers. (Tr., pp. 63-64) The heaviest items Lowe had to lift were transmissions, weighing between fifty and seventy-five pounds. (Tr., pp. 62-63) Lowe used a forklift to move heavier items, such as motors. (Tr., p. 62)

For his residential properties Clarke had Lowe clean gutters, clean out clutter, perform roof repair, paint ceilings, perform carpentry, electrical and plumbing work, mow the grass, and perform other yardwork. (Tr., pp. 13, 64) Lowe would occasionally have to climb up ladders and lift up to twenty-five pounds to perform his maintenance functions. (Tr., pp. 14, 64) Clarke provided Lowe with his job assignments every day. (Tr., p. 16)

During Lowe's employment, Midwest Wrecking provided its employees with an hour unpaid lunch break and two paid fifteen minute breaks each day. (Tr., pp. 38-39, 50, 87) The employees clocked out for the lunch breaks, but did not clock out for the fifteen minute breaks. (Tr., p. 50) Clarke reported the employees typically left the salvage yard during their lunch breaks and could go wherever they wanted. (Tr., pp. 38-39) Clarke did not require employees to take their two fifteen minute breaks at any set time and the employees did not punch out for their fifteen minute breaks. (Ex. 9, pp. 77-78) Employees working at the salvage yard had access to soda pop and candy machines on the premises to purchase snacks during breaks. (Tr., p. 38) The employees did not have to ask for permission to purchase a snack or take a break. (Tr., p. 38)

When Lowe worked off site from the salvage yard, he would clock in at the salvage yard in the morning and travel to an off-site location. Lowe would later call Chrissinger when he wanted to take his unpaid lunch break and she would clock him out and he would call Chrissinger when he was through with his lunch break to clock him in. Chrissinger recorded Lowe's lunch breaks on his time card. (Ex. 15)

On September 20, 2017, Lowe clocked in at the salvage yard at 9:14 a.m., which is reflected in his time card. (Tr., p. 71; Ex. 15, p. 206) Clarke assigned Lowe to perform maintenance work at an off-site residential property he owned which is located at 5215 North Pine in Davenport, Iowa ("North Pine Home"). (Tr., pp. 10-11, 13, 15, 71; Ex. 16) Lowe did not have a valid driver's license at that time and Clarke often transported him to work. (Tr., p. 15) Clarke does not believe he drove Lowe to the North Pine Home on September 20, 2017. (Tr., p. 16) Lowe does not recall how he was transported to the North Pine Home. (Tr., p. 72) There was a refrigerator, microwave and stove at the North Pine Home and Lowe could have brought his own lunch and snacks to work. (Tr., pp. 39, 89)

At 12:38 p.m. on September 20, 2017, Lowe called Chrissinger to report he was going to lunch. (Tr., pp. 71-72) During the hearing Lowe testified he could not recall he if called Chrissinger to clock back in following lunch, but he recalls returning to work at the North Pine Home after lunch. (Tr., pp. 72-73)

During his deposition Lowe testified he recalled calling Chrissinger to clock back in after lunch. (Ex. F, p. 7) Lowe reported he recalled speaking with Chrissinger, but she might have been busy. (Ex. F, p. 7) Lowe testified Chrissinger normally correctly completed his time cards. (Tr., p. 74) Lowe checked his time card each

Thursday, and at times he had to make a few adjustments. (Tr., p. 74) Lowe reported sometimes when he would call Chrissinger, Chrissinger would be busy and not available to clock him in. (Ex. F, p. 7)

There is a Big 10 Mart convenience store near the intersection of West 53rd and North Pine, a short distance from the North Pine Home, on the opposite side of the street from the North Pine Home. (Tr., p. 10; Ex. 16) The North Pine Home is located south of the intersection of West 53rd and North Pine. (Tr., pp. 11-12) Lowe reported the afternoon of September 20, 2017, he went to the convenience store to buy a soda pop during his fifteen minute break. (Tr., pp. 73, 87) Midwest Wrecking did not require Lowe to take his break at any particular location. (Tr., pp. 39, 88-89) Lowe reported he went to the Big 10 Mart convenience store because it was the closest to the North Pine Home. (Tr., pp. 88-89) Lowe reported when he left he did not call Chrissinger to punch him out because he was taking a paid fifteen minute break. (Tr., pp. 73-74)

Lowe was struck by a vehicle on September 20, 2017. (Tr., p. 16) Lowe does not recall the accident. (Tr., p. 74) In his answers to admissions, Lowe admitted on September 20, 2017 he was hit while crossing a public road or sidewalk, he was not on Midwest Wrecking's property, and at the time of the accident he was not performing any errand related to his employment with Midwest Wrecking. (Ex. E, pp. 1-2) Lowe admitted when he was struck by the motor vehicle he was walking to the Big 10 Mart to purchase a soda pop. (Ex. E, p. 2) Lowe denied he was on an unpaid break, stating he was on a paid break. (Exs. E, p. 1; F, p. 8)

According to the Investigating Officer's Report of Motor Vehicle Accident, the accident occurred at 2:46 p.m. on September 20, 2017, at the corner of West 53rd Street and North Pine Street in Davenport. (Ex. 6, p. 26) The report provides:

> PED WAS CROSSING FROM EAST TO WEST ON S/E CORNER OF INTERSECTION. RT (CURB) LANE WAS CLOSED DUE TO CONSTRUCTION WORK.
>
> PED WAS STRUCK BY VEHICLE GOING NORTH BOUND AND KNOCKED TO THE GROUND STRIKING HIS HEAD. PED WAS TRANSPORTED TO GENESIS EAST BY MEDIC EMS.
>
> WIT WAS GOING EAST ON 53RD ST STATED SHE WAS STOPPED FOR A RED LIGHT WAITING FOR CROSS TRAFFIC TO MAKE A RIGHT TURN ONTO PINE ST. WIT STATED SHE HEARD THE IMPACT AND SAW PED TUMBLE TO THE GROUND. STATED THERE WAS A GREEN VAN NORTH BOUND RIGHT WHERE SHE SAW THE PED TUMBLE. WIT HAD NO FURTHER INFORMATION ON THE SUSPECT VEHICLE.

> VIC WAS INTERVIEWED DURING FOLLOWUP AND REMEMBERS NOTHING OF THE CRASH DUE TO HITTING HIS HEAD.
>
> AT THIS TIME THERE IS NO SUSPECT VEHICLE INFORMATION OR ANYTHING WHICH IDENTIFIES A SUSPECT.

(Ex. 6, p. 27)

Lowe was transported to Genesis East and then he was taken by helicopter to the University of Iowa Hospitals and Clinics ("UIHC"). (Tr., p. 75; JE 1, p. 3; JE 3, p. 19) At the UIHC, Lowe received computerized tomography scans of his brain, chest, and left shoulder. (JE 3, p. 29) Lowe was diagnosed with a left subdural hematoma, left subarachnoid hemorrhage, open right frontal skull fracture, and small right pneumothorax. (JE 3, p. 29) Brian Dlouhy, M.D., a neurosurgeon, performed a left-sided frontotemporoparietal craniotomy for evacuation of the subdural hematoma and diagnosed Lowe with a traumatic brain injury, with a left convexity acute subdural hematoma causing mass effect and brain compression, and a left frontal hemorrhagic brain contusion. (JE 3, p. 31)

Clarke learned of the motor vehicle collision involving Lowe on September 20, 2017, and that Lowe had been transferred to the UIHC. (Tr., p. 16) Clarke testified he did not know the exact location where Lowe was hit by the motor vehicle on the date of accident, but he knew it was in the vicinity of the North Pine Home. (Tr., pp. 16-17) Clarke reported he understood Lowe was either coming or going from a convenience store near the North Pine Home when the accident occurred. (Tr., pp. 34-35)

Clarke testified he had a conversation with his girlfriend, Chrissinger, about whether Lowe was clocked in at the time of the accident. (Tr., p. 45) Clarke testified "I didn't investigate because Sandy told me that he hadn't called back in to punch back in from lunch." (Tr., p. 45) Clarke testified Lowe was off the clock at the time of his work injury and had not clocked back in from his unpaid lunch break when the accident occurred. (Tr., p. 34)

Chrissinger prepared a statement, which is not notarized, stating in August 2018 Lowe came to Midwest Wrecking to order supplies for his truck and during the visit he told her he was sitting at home most of the time with nothing to do. She relayed Lowe told her she knew it was

> know [*sic*] one's [*sic*] else fault but his own and that he was not working at the time of the accident, because he was on his lunch break and had, not gone back to work yet (He had called me at 12:38pm too [*sic*] write him out for lunch and never called me back too [*sic*] write him back in from lunch). He was going to the Quick Mart for some lunch and something cold to drink. He did say he was standing on the corner of West 53rd Street and North Pine, when he got ran over [*sic*] by a vehicle.

(Ex. B, p. 1)

Chrissinger was deposed on September 11, 2019. (Ex. 8) When clocking employees out and in, Chrissinger did not use the time clock, instead writing her initials, "SC" on the timecard in a circle. (Ex. 8, pp. 46-47) Chrissinger testified,

> I only do it when, you, they forget or something like that. Now, I – if you're getting at Vern's card here where I got my S.C. and he didn't call me that day and have him punch back in.
>
> I had to put my initial there so when – if he had called me and said Sandy, punch me back in, I would have put the time there. But he didn't call me that day, so that's why my initial is there.

(Ex. 8, p. 47) Chrissinger reported Lowe was "always was really good" about calling to have her write his time in on his time card. (Ex. 8, p. 47) Chrissinger reported on the date of the incident after Lowe punched out for lunch "[h]e never called me to say Sandy, I'm back on the clock, I'm back from lunch, or anything like that. He never called me." (Ex. 8, p. 47)

Chrissinger reported after Lowe clocked out for lunch she received a call at 2:26 p.m. stating Lowe had been hit by a car. (Ex. 8, pp. 47-48, 50. 53) Later Chrissinger received a call from the hospital stating Lowe was being sent by a helicopter to the UIHC. (Ex. 8, p. 47)

Lowe's attorney asked Chrissinger whether the lines of the time card from the date of Lowe's accident looked different. (Ex. 8, p. 48) She replied, "[n]o. It's – it looks like it's – there's lines here on the – you know, some of the other cards that are messed up a little bit. But no, that hasn't been drawn there at all." (Ex. 8, p. 48) Chrissinger denied altering the time card. (Ex. 8, p. 48)

The time cards were produced as Exhibits 10 and 15. The original paper time cards, found in Exhibit 15, were produced after Chrissinger's deposition.

During the week of the accident Lowe worked on Monday, Tuesday and Wednesday. (Ex. 15, p. 206) The time cards contain Chrissinger's handwritten marks. (Tr., p. 47) The time card for Lowe the week of the accident shows on Monday Lowe called to clock out for lunch at 12:41 p.m. and called to clock in at 1:41 p.m., and on Tuesday Lowe called to clock out for lunch at 1:39 p.m. and called to clock in at 2:38 p.m. (Ex. 15, p. 206) Chrissinger handwrote the times Lowe called in. (Tr., p. 47; Ex. 15, p. 206) The time card shows on Wednesday, Lowe clocked out for lunch at 12:38 p.m. (Ex. 15, p. 206; Tr., p. 47) The time card does not document Lowe called to clock back in. (Ex. 15, p. 206) Clarke testified it would be abnormal for Lowe to go to lunch and leave work for the day without asking Clarke for permission before leaving. (Tr., pp. 50-51)

I find Lowe's original time card for the date and time of the accident has been modified. (Ex. 15, p. 206) The top layer of the paper for the space that would contain the time Lowe called to clock back in is missing and the lines for the card have been drawn in with a pen. (Ex. 15, p. 206) Clarke testified at hearing he does not know what happened with the time card. (Tr., p. 50) Lowe testified he did not make any marks on the time card. (Tr., p. 86) During his deposition, Clarke admitted the time card from the date of the accident had "some difference" and the lines "look a little different." (Ex. 9, p. 80) Clarke denied knowing anything about the time card. (Ex. 9, p. 80) I do not find Chrissinger's or Clarke's testimony concerning the time card reasonable or consistent with the other evidence I believe; they are not credible witnesses. I find the time card has been tampered with and altered. I believe Midwest Wrecking modified the time card after Lowe's accident in bad faith. I find that on the day of the accident Lowe returned to work following lunch and at the time of the accident he was on a paid break from Midwest Wrecking.

Clarke visited Lowe at the UIHC between his admission in September 2017 and October 2017, when Lowe was released from the hospital. (Tr., p. 18) During his visit Clarke learned Lowe had sustained a traumatic brain injury. (Tr., p. 18) Clarke agreed during direct examination he knew Lowe had sustained a traumatic brain injury within thirty days of the September 20, 2017 accident. (Tr., p. 18)

During his treatment at the UIHC, an employee of the hospital helped Lowe apply for Social Security Disability Insurance ("SSDI") benefits. (Tr., p. 81) Lowe's application was approved. (Tr., p. 81) Lowe had previously applied in 2005 because his wife told him he did not read well and his application was denied. (Tr., p. 81) Lowe did not report any physical problems with his 2005 application. (Tr., p. 89)

Following his head injury Lowe had problems with walking, balance, dizziness, and speaking. (Tr., p. 76) The UIHC released Lowe to a rehabilitation facility on October 6, 2017 to work on ambulation. (Tr., p. 76; JE 3, p. 55; JE 4, pp. 84-88; JE 5, p. 90) The facility discharged Lowe to his home on November 12, 2017. (JE 3, p. 55)

After he was released from the rehabilitation facility Lowe experienced problems with his temper and headaches. (Tr., pp. 76-77; JE 3, p. 68) On March 2, 2018, Lowe was readmitted to the UIHC by Dr. Dlouhy after a brain computerized tomography scan showed a "large right frontal subdural hematoma with mass effect and midline shift." (JE 3, p. 62) Dr. Dlouhy performed surgery creating right sided burr holes to evacuate the subdural hematoma and diagnosed Lowe with a "prior left craniotomy for [subdural hematoma] evacuation with interval development of right frontal [subdural hematoma status post] burr hole washout." (JE 3, pp. 66-70) Lowe was discharged on March 4, 2018. (JE 3, p. 72)

During a follow up appointment on March 16, 2018, Dr. Dlouhy documented he reviewed a brain computerized tomography scan which showed a decrease in the size of the right frontal subdural hematoma with no signs of infection and noted Lowe was

asymptomatic and doing well. (JE 3, p. 75) Lowe continued to treat with Dr. Dlouhy with no additional complications. (JE 3, pp. 79-83)

Sometime after his discharge from the rehabilitation facility, Lowe started riding with Clarke in Clarke's tow truck. (Tr., pp. 18-19) Clarke believes Lowe started riding with him sometime during the summer of 2018, for a few weeks. (Tr., pp. 19, 23) Clarke did not pay Lowe for any work when he rode with him in his tow truck. (Tr., p. 20) Clarke testified he did not consider Lowe to be an employee at that time, and he was concerned about his ability to work because he had a "pretty good scar on his head" and he "[h]ad some of his skull removed." (Tr., p. 20) Clarke agreed he knew Lowe's head injury was significant and he was concerned about whether Lowe could work. (Tr., p. 21) Clarke reported he gave Lowe some money as a friend. (Tr., p. 20)

Clarke testified about a year after the accident he first learned Lowe was claiming the September 20, 2017 accident was work-related when he received mail from Lowe's attorney. (Tr., pp. 36-37) Clarke relayed he did not believe the accident was work-related because it did not occur on the premises or during Lowe's working hours. (Tr., p. 37)

On August 1, 2018, Accident Fund sent Lowe's attorney a letter informing Lowe it had determined his claim for workers' compensation benefits was not compensable because the injury did not arise out of or in the course of his employment with Midwest Wrecking. (Ex. A, p. 1)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, arising out of and in the course of employment, notice, nature and extent of disability, entitlement to temporary benefits, recovery of medical bills, recovery of the cost of an independent medical examination, recovery of costs, and interest under Iowa Code sections 85.23, 85.27, 85.33, 85.34, 85.39, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability and the recovery of the cost of an independent medical examination under Iowa Code sections 85.33, 85.34, and 85.39 apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re:

Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Timely Notice

Midwest Wrecking and Accident Fund contend Lowe's claim is barred for failure to provide proper notice under Iowa Code section 85.23. Lowe rejects their assertion and contends Midwest Wrecking had actual notice of his injury.

Iowa Code section 85.23, provides:

> [u]nless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the alleged occurrence of the injury, no compensation shall be allowed.

The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work-connected." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W. 91, 92 (1940). The evidence supports Midwest Wrecking had actual knowledge of Lowe's injury the date he was injured. I find that after learning of Lowe's injury Midwest Wrecking modified Lowe's time card in an underhanded attempt to avoid liability under the workers' compensation laws. Midwest Wrecking and Accident Fund have not proven their affirmative defense.

III. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the course of the claimant's employment. Coffey v. Mid Seven Transp. Co., 831 N.W.2d 81, 93 (Iowa 2013); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 253-54 (Iowa 2010). An injury "arises out of" the claimant's employment when a causal relationship exists between the claimant's employment and the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 129 (Iowa 1995). Thus, "the injury must be a 'rational consequence of the hazard connected with the employment.'" Id. "In the course of" the claimant's

employment "refers to the time, place, and circumstances of the injury." Id. "An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be engaged in doing something incidental thereto." Great Rivers Med. Ctr. v. Vickers, 753 N.W.2d 570, 574 (Iowa 2008).

On September 20, 2017, Midwest Wrecking assigned Lowe to travel to the North Pine Home to perform repairs on the home. Employees at the salvage yard had access to vending machines to purchase snacks and beverages on the premises during their paid breaks. While the North Pine Home had a refrigerator and Lowe had access to water at the North Pine Home, Midwest Wrecking did not offer Lowe the option of purchasing snacks or beverages on site at the North Pine Home. Lowe's injury occurred on a busy street close to the job site and during his paid break when he went to obtain a soda pop from a convenience store for his personal refreshment. Midwest Wrecking did not require Lowe to take a break at the convenience store or to take his break at a particular time. Lowe was not running an errand or performing some other action for Midwest Wrecking at the time of the accident, he was attending to a personal matter and he was injured a distance from the North Pine Home in an area Midwest Wrecking did not own or control.

As a general rule, "absent special circumstances, injuries occurring off employer's premises while workers' compensation claimant is on the way to or from work are not [generally] compensable." Quaker Oats v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996). This is known as the "going and coming" rule. Id. This same rule "ordinarily applies when the employee has a place and hours of work, his hours of work do not include his meal period, and he leaves his place of employment to go to and return from his meal elsewhere." Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978).

There are several exceptions to the "going and coming" rule that "extend the employer's premises under certain circumstances when it would be unduly restrictive to limit coverage of compensation statutes to the physical perimeters of the employer's premises," including the special hazards of an employee's route exception, the special service or errand exception, required travel exception, and the divided premises exception. Ciha, 552 N.W.2d at 151; Bailey v. Batchelder, 576 N.W.2d 334, 339-40 (Iowa 1998); Frost v. S.S. Kresge Co., 299 N.W.2d 646, 648-49 (Iowa 1980); Halstead, 264 N.W.2d at 760. At the time of his injury, Lowe was not performing a service or errand for Midwest Wrecking, or exposed to a special hazard at the job site. Lowe was working at a home owned by Clarke, his employer. The injury occurred when Lowe was obtaining a soda pop for his personal refreshment during a paid break.

If an employee is injured during a break, the employee may have a compensable claim if the employer controls the circumstances of the break, such as requiring the employee to take a break at a particular location, at a particular time, or requiring the employee to perform duties for the employer during the break. See, e.g.,

Ray v. Univ. of Ark., 990 S.W.2d 558 (Ark. Ct. App. 1999) (claimant who was injured while going to obtain an apple during a paid break had a compensable claim where the employer required her to be available to help students even if she was on a paid break); Alan S. Pierce, Cause of Action to Recover Workers' Compensation Benefits for Injuries Suffered by Employee Acting Beyond Regular Scope of Duty Under "Personal Comfort Doctrine" or During Athletic, Recreational or Social Activities, 22 Causes of Action 2d 163 (2019). The evidence in this case supports Midwest Wrecking did not control the circumstances of Lowe's break by directing Lowe to take his break at a particular location or time. Lowe was able to take his break when and where he chose to. See Huggins v. Masterclass Masonry, 83 A.D.3d 1345, 1346-47 (N.Y. App. Div. 2011) (worker who was injured when a glass panel in a municipal bus shelter fell on him during his lunch break did not have a compensable claim even though the shelter was directly across the street from his work site and the foreman could have called him to come back to work because the employer did not retain control over the worker during his lunch break, the employer did not receive any benefit from the worker eating his lunch inside the bus shelter, and the employer did not instruct the worker where to take his lunch).

Lowe argues he was on paid break when he was injured in the course of his employment with Midwest Wrecking. In the case of Halstead, decided in 1978, Halstead argued Iowa should adopt the "coffee break" or "rest break" exception to the going and coming rule. 264 N.W.2d at 759. The Iowa Supreme Court noted a number of states had analyzed the issue, some adopting the exception and finding an injury during a coffee or lunch break compensable, and others finding the activity was not on company time, and thus, not compensable. Id. The court declined to formally adopt the exception, finding:

> [t]he general rule is that off-premises meals on the employee's time are not compensable, and the employee must show additional facts to bring himself within an exception. Here claimant showed no such facts. With commendable candor he stated that on the day in question he had the regular lunch period, he did not get paid for it, he took it off-premises, and he performed no duties for the employer. To apply a claimed exception to these unexceptional facts would wipe out the rule itself.
>
> We thus have no occasion to say and we do not say whether Iowa recognizes an exception in the so-called off-premises coffee break and lunch break situations where the employee proves circumstance which he claims show the break was actually on company time.

Id. Since this holding in 1978, neither the Iowa Supreme Court nor the Iowa Legislature have adopted the paid "coffee break" or paid "lunch break" exception to the going and coming rule. Other states have expressly adopted the "coffee break" or "lunch break" exception, with some requiring the claimant to prove additional elements to establish a compensable claim. See, e.g., BeVan v. Liberty N.W. Ins. Corp., 340

Mont. 357, 361, 174 P.3d 518, 521 (2007) (in determining whether an employee's injury while on a break is compensable, the court examines "(1) whether the employee was paid during the break, (2) whether the employment contract entitled the employee to the break, (3) whether restrictions limited where the employee could go during the break, and (4) whether the employee's activity constituted a substantial personal deviation" and finding the claimant sustained a compensable injury when she went home to care for her dog because she was was on a paid break, the employer set parameters for breaks, including limiting the breaks to fifteen minutes and requiring the claimant to "make up the time if she returned more than a few minutes late from her break," requiring employees to ensure there was sufficient coverage in the store, noting the claimant had to postpone her breaks and sometimes received no break because the customer came first, and her activity was not a "substantial personal deviation" because she regularly left work on her breaks, the claimant would have returned on time if she had not been in the accident, the employer acquiesced to employees leaving the premises, and the claimant's break was late because she was helping customers and could not go home for her usual lunch break); Wood Pontiac Cadillac v. Superior Ct., 6 Cal. Rptr. 2d 924, 925 (Cal. Ct. App. 1992) (noting the going and coming rule generally precludes recovery for injuries sustained during uncompensated meal breaks, but "an employee's injuries while traveling to or from a *compensated* meal break are compensable whether the employee is paid at an hourly rate, or is salaried); Roache v. Indust. Comm'n of State of Colo., 729 P.2d 991, 992 (Colo. App. 1986) (finding an off-site injury compensable where the break period was of short duration, the break was paid, food and drink were not available on the premises, employees were expressly permitted to go the convenience store to purchase food and drink, the store was not located far from the claimant's place of employment, and the visit was for the purpose of rest and refreshment); Jordan v. W. Elect., 1 Or. App. 441, 447-48, 463 P.2d 598, 601-02 (1970) (finding employee who slipped on curb and injured himself while on a paid coffee break sustained compensable injury because the activity was for the employer's and the employee's benefit, the activity was contemplated under the contract of employment, the employer exercised control over the break because the supervisor accompanied the employees on the break, and the break was paid for the time involved).

Lowe relies on two decisions of the agency he alleges support his contention the injury he sustained during his paid break arose out of and in the course of his employment, Krell v. Larson Contracting Central, LLC, File No. 5055555 (Arb. Dec. Nov. 1, 2017) (aff'd on appeal, Apr. 26, 2019) and Freisinger v. Advanced Data Comm. Inc., File No. 1058226 (Arb. Dec. Jan. 14, 1997). The claimant was on a paid break in both cases. While the decisions do not discuss the exception or test used, they both appear to use the "reasonable distance test" to find the location and timing of the injuries during paid breaks fell within the zone of protection of the workers' compensation law. Under the reasonable distance test, the situs of an injury may be deemed to be the employer's premises when it is "in close proximity" to the employer's premises. Frost, 299 N.W.2d at 649 (finding an employee who fell on a public sidewalk between twelve and twenty feet from the entrance of the store was entitled to

compensation because she fell in an area used by all employees entering and leaving the store creating a strong "nexus of the work relationship," and also finding the extension of the premises exception also applied because the employer exercised control over the sidewalk by displaying merchandise on the sidewalk and clearing the sidewalk of ice and snow).

In Krell, File No. 5055555, the employee sustained an injury when he insulted a coworker and the coworker tackled him while he was sitting under a shade tree located twenty-five feet from the jobsite during a paid break. The deputy workers' compensation commissioner found the shade tree was a reasonable and permissible place for employees to take their break and "that the location and timing of this injury were near the actual work site and that claimant did not substantially deviate from his job duties during this paid break."

In Freisinger, File No. 1058226 the employee sustained an injury when she went to smoke in a room maintained by the building, but not by the employer, during a paid fifteen minute break. The deputy workers' compensation commissioner found the injury occurred within the course of employment because the claimant was on a paid break and she had permission to take her break in the smoke room maintained by the building, but not maintained or controlled by the employer.

The facts of this case are not akin to the facts of Krell and Freisinger. The actual distance between the North Pine Home and the convenience store was not presented at hearing. The map of area shows the North Pine Home was not adjacent to the convenience store, like the tree in Krell, or in the same building like Freisinger. (Ex. 16)

While Lowe's injuries were very severe and the employer's post-injury conduct reprehensible, the facts of this case do not support Lowe's injuries arose out of and in the course of his employment with Midwest Wrecking. No evidence was presented of the weather on the date of the incident supporting the need to go to the store for refreshment to avoid dehydration or some other physical condition caused by the work. Before the accident Lowe was performing work inside the home and he had access to water and to a refrigerator. Lowe went to the convenience store for his personal comfort, to purchase a soda pop. The risk Lowe encountered when going and coming from the convenience store was not a risk his employment introduced falling within the zone of protection of the workers' compensation law. Cf. Sedgwick CMS v. Valcourt-Williams, 271 So. 3d 1133 (Fla. Dist. Ct. App. 2019) (employee working from home who was injured during working hours while tripping over her dog while reaching for a coffee cup did not sustain a compensable injury because the risk she encountered was not a risk her employment introduced); Constr. Mgmt. & Design, Inc. v. Vanderweele, 660 N.E.2d 1046, 1050 (Ind. Ct. App. 1996) (finding an injury sustained by employee while assisting a stranded motorist on private property adjacent to the employer's job site did not arise out of and in the course of the employee's employment despite the fact the injury occurred during a paid break

because the injury occurred off the employer's premises, while the worker was helping a stranded motorist, which could only be described as personal and not in furtherance of the employer's business). Based on this finding, the issues of extent of disability, entitlement to temporary benefits, and recovery of medical expenses are moot.

IV. Independent Medical Examination

Lowe seeks to recover the $2,972.00 cost of Dr. Bansal's independent medical examination. (Ex. 1, p. 7) Iowa Code section 85.39(2) (2017), provides:

> 2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

No physician retained by the employer provided an impairment rating before Dr. Bansal conducted the independent medical examination for Lowe. Additionally, Lowe was not successful in proving he sustained a compensable injury. Under the statute, Lowe is not entitled to recover the cost of Dr. Bansal's independent medical examination.

V. Costs

Lowe seeks to recover the $100.00 filing fee, $500.00 for Dr. Dlouhy's report, $463.76 for Lowe's deposition, $509.40 for Clarke and Sird depositions, and $2,391.00 for Dr. Bansal's report. (Ex. 13, pp. 167-68)

Iowa Code section 86.40 provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." And rule 876 Iowa Administrative Code 4.33(6), provides

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

Lowe was not successful in proving he sustained a compensable injury in this case. I find the parties should bear their own costs.

ORDER

Claimant shall take nothing in this case.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 27th day of February, 2020.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (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.