BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ARON HESER, Claimant, vs. STAR APPLIANCES, INC., Employer, EMC INSURANCE COMPANIES, Insurance Carrier, Defendants.	: : : : : : : : : : : : : :	File No. 1661411.01 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2501, 2502, 2701, 2907

STATEMENT OF THE CASE

Aron Heser, claimant, filed a petition for arbitration against Star Appliances, Inc., as the employer, and EMC Insurance Companies, as the insurance carrier. This case came before the undersigned for an arbitration hearing on August 24, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

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

The evidentiary record includes Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 10, as well as Defendants Exhibits A through G. Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on November 12, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary total disability, or healing period, benefits from March 5, 2019 through December 15, 2020.

2. The extent of claimant's entitlement to permanent disability benefits.

3. The proper commencement date for permanent disability benefits.

4. The extent of defendants' entitlement to credit and potential overpayment of weekly benefits.

5. Whether claimant is entitled to payment, reimbursement, or an order for defendants to hold claimant harmless for past medical expenses.

6. Whether claimant is entitled to reimbursement for his independent medical evaluation pursuant to Iowa Code section 85.39.

7. Whether claimant is entitled to penalty benefits for an alleged unreasonable delay and denial of weekly benefits.

8. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Aron Heser, claimant, is a 38-year-old man, who lives in Central City, Iowa. Mr. Heser possesses a 10th grade education and a commercial driver's license (CDL) that permits only intra-state transport within the state of Iowa. Claimant is a large man, standing 6 feet 2 inches tall and weighing over 400 pounds, who has worked manual labor positions throughout his work life.

In approximately 2004 to 2005, claimant worked as a book binder helper, assisting with the operation of a machine that put pages into and bound them in books. Claimant was fired from that job because he could not get along with another employee. After his termination, claimant estimates that he was a stay-at-home dad for the next five years.

When he returned to the workforce, Mr. Heser opened a business, Summit Services, with his father. He maintained no records of his earnings in this business and estimates that he earned less than $10,000 per year, though he is really not sure of the amount of his earnings. In this business, claimant performed metal recycling, appliance recycling, hauling items for people, and home building.

Mr. Heser also worked as an appliance installer for his father's business, Star Appliances, for approximately six months in 2012. This was a temporary arrangement while claimant got the other business up and operational. Claimant subsequently quit

working for Summit Services in 2014. Claimant filed no tax returns for his years of self-employment and cannot produce any documentation or estimates of his earnings.

In 2015, Mr. Heser returned to work for his father's business, Star Appliances. In this employment, claimant delivered and installed new appliances for customers. On March 4, 2019, claimant was performing appliance deliveries for the employer. Unfortunately, while performing his typical duties, claimant stepped off the back of the lift gate on the delivery truck and fell to the ground while still clutching the appliance dolly.

Mr. Heser testified that he fell and landed on his back and shoulder on March 4, 2019. Mr. Heser was unable to complete his shift on March 4, 2019. Contemporaneous medical records from the date of the injury only mention a fall onto or symptoms in the left shoulder. (Joint Exhibit 1, p. 2; Joint Ex. 2, p. 5) In fact, the contemporaneous medical record from the date of injury records that claimant fell onto his left shoulder, expressed symptoms in the collarbone region, and confirmed he had no other injuries at that time. (Joint Ex. 1, p. 2) Nevertheless, by his return evaluation March 8, 2019, claimant was reporting symptoms into his thoracic spine. (Joint Ex. 2, p. 5)

Defendants authorized treatment for claimant's thoracic spine. Initially, conservative care was ordered with claimant pursuing physical therapy in March and April 2019. (Joint Ex. 3) Physical therapy resolved claimant's shoulder symptoms. Unfortunately, Mr. Heser's thoracic back symptoms continued.

Due to claimant's size, his physicians had difficulty finding a facility that could perform an MRI on claimant's thoracic spine. However, Mr. Heser submitted to a CT scan of his thoracic spine on June 10, 2019. It revealed some degenerative changes but no acute compressions or fractures. (Joint Ex. 6, p. 46)

Mr. Heser returned to the authorized occupational medicine clinic and a nurse practitioner re-evaluated claimant on May 3, 2019. In that office note, the nurse practitioner noted that claimant "slipped and fell, catching himself in the shower in March, and this increased his thoracic back pain." (Joint Ex. 2, p. 15) There is no further significant discussion or mention of this event in subsequent medical records and apparently is not a significant event in claimant's development and continued back symptoms.

The authorized occupational medicine physician, Jeffrey Westpheling, M.D., re-evaluated claimant in May and June 2019. Unfortunately, his thoracic spine symptoms continued and Dr. Westpheling recommended referral to a pain specialist at the University of Iowa Hospitals and Clinics. (Joint Ex. 5, p. 38) Rahul Rastogi, M.D., a pain specialist, attempted a thoracic steroid injection on August 12, 2019. However, claimant developed complications during the procedure and the injection was not completed. (Joint Ex. 7, pp. 57, 64-65) Upon his return to the University of Iowa Hospitals and Clinics on September 4, 2019, Eric Aschenbrenner, a physiatrist, evaluated claimant. He recommended no further treatment, other than a TENS unit,

and released claimant with a recommendation he lift 15-25 pounds only rarely. (Joint Ex. 7, p. 69)

Dr. Westpheling re-evaluated claimant on October 15, 2019. At that juncture, Dr. Westpheling concurred that no further treatment was indicated and declared maximum medical improvement as of October 15, 2019. He recommended a functional capacity evaluation (FCE), which was performed on October 29, 2019. (Joint Ex. 5, p. 42) Pending the outcome of the FCE, Dr. Westpheling recommended claimant lift no more than 50 pounds on an occasional basis, nor more than 25 pounds on a frequent basis, and not more than 10 pounds on a constant basis. He also recommended that Mr. Heser be permitted to change his positions as comfort dictated. (Joint Ex. 5, p. 43)

The FCE was determined to be inclusive and there is a suggestion from the therapist that claimant may not have given full effort during the evaluation. However, the evaluating therapist opined that claimant was capable of working in "at least a Medium physical demand level." (Joint Ex. 8, p. 86) The FCE demonstrated claimant was capable of lifting at least 50 pounds from 12 inches above the floor to waist level on an occasional basis. However, it recommended a 20-pound lift on an occasional basis from the floor or from waist to shoulder and only a 15-pound lift overhead. The FCE also recommended claimant only occasionally stand or walk. (Joint Ex. 8, p. 87)

Dr. Westpheling reviewed the FCE recommendations, noted the therapist's concerns about self-limitation by claimant. Nevertheless, Dr. Westpheling confirmed that claimant should not lift more than 50 pounds on an occasional basis, 25 pounds frequently, and 10 pounds constantly. He also confirmed that claimant should "alternate his positions as needed for comfort throughout the workday." (Joint Ex. 5, p. 43) Although he imposed permanent work restrictions, Dr. Westpheling opined that claimant sustained no permanent impairment under the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. (Joint Ex. 5, p. 44)

Claimant's employment at Star Appliances required claimant to lift and maneuver appliances far in excess of 50 pounds. I find that claimant was not capable of returning to work at Star Appliances in the position he held on the date of his injury. In fact, claimant did not return to work for Star Appliances after his injury date.

After Dr. Westpheling released him from care, Mr. Heser requested that defendants provide the thoracic MRI that had previously been recommended. Defendants agreed to have claimant evaluated by another surgeon and scheduled claimant to be evaluated by Benjamin D. MacLennan, M.D., on May 1, 2020. Dr. MacLennan identified no objective signs of neurologic impingement and opined that surgical intervention was not warranted. Dr. MacLennan noted that further treatment with a pain specialist was a possibility. However, claimant was not certain at the May 1, 2020 appointment whether he wanted to pursue further pain management treatment. (Joint Ex. 9, p. 97)

Mr. Heser subsequently obtained insurance coverage and sought further treatment through Stanley J. Mathew, M.D., a physiatrist. (Joint Ex. 10) Dr. Mathew

evaluated claimant on July 6, 2020. He recommended claimant pursue the thoracic MRI and suggested that trigger point injections may be helpful for claimant. (Joint Ex. 10, p. 100)

Claimant obtained the thoracic MRI and, on August 24, 2020, Mr. Heser sought evaluation at UnityPoint Clinic's Neurosurgery department. The neurosurgery provider opined that the thoracic MRI demonstrated significant spinal stenosis. (Joint Ex. 10, p. 105) Ultimately, surgery was not recommended, and claimant was referred to Mark D. Kline, M.D., a pain specialist for trigger point injections. The first trigger point injection occurred on September 14, 2020 with two additional injections occurring thereafter. (Joint Ex. 10, pp. 108-127) Claimant testified the injections may have provided short-term symptom relief but no significant or extended relief.

On October 14, 2020, claimant sought evaluation with a personal physician, Katherine I. Meyers, D.O. Dr. Meyers noted that claimant was presenting to establish care on that date and that he was struggling with depression from back pain and decreased activity after his work injury in March 2019. (Joint Ex. 11, p. 133) At that time, Mr. Heser declined a recommendation to see a mental health counselor. (Joint Ex. 11, p. 134)

Mr. Heser returned for evaluation by Dr. Meyers on October 28, 2020. Dr. Meyers diagnosed him with a severe episode of recurrent major depressive disorder, without psychotic features and generalized anxiety disorder at that time. (Joint Ex. 11, p. 140) Dr. Meyers recommended some medications, which claimant testified were not helpful and he discontinued taking those medications.

Mr. Heser challenged the impairment rating and restrictions offered by Dr. Westpheling by obtaining an independent medical evaluation, performed by David Segal, M.D., on December 12, 202. Dr. Segal issued a subsequent report dated January 29, 2021. Dr. Segal recorded a history from claimant that "he fell backwards off the gate, somehow twisted to the right, landed first on his right side, and then on his back with the dolly in his hand." (Claimant's Ex. 1, p. 11)

Dr. Segal diagnosed claimant with traumatic facet arthropathy, a disc herniation at T6-7, a nondisplaced laminar fracture at T4, aggravation of preexisting degenerative disease, as well as dysfunction of gait and station. (Claimant's Ex. 1, p. 16) Dr. Segal opined that the work injury was a substantial contributing factor in producing the diagnoses he offered for claimants' condition. (Claimant's Ex. 1, p. 22) However, Dr. Segal disagreed with the MMI date offered by Dr. Westpheling. Instead, Dr. Segal noted treatment occurred after October 15, 2019. Dr. Segal opined that claimant did not achieve MMI until December 15, 2020, one week after he completed his final thoracic injection. (Claimant's Ex. 1, p. 24)

Dr. Segal also disagreed with the impairment rating offered by Dr. Westpheling. Dr. Segal opined that claimant qualifies for an 8 percent permanent impairment rating of the whole person as a result of the thoracic injury. He assigns an additional 9 percent permanent impairment of the whole person as a result of claimant's altered station and

gait. Combining these impairments, Dr. Segal opines that claimant qualifies for a 16 percent permanent impairment of the whole person as a result of the March 4, 2019 work injury. (Claimants' Ex. 1, pp. 25-26)

Dr. Segal also offered permanent restrictions contained at Claimant's Exhibit 1, page 27. Among those restrictions recommended, Dr. Segal suggests claimant limit lifting to no more than 15 pounds from any position occasionally, less from the floor or overhead. Dr. Segal also recommends claimant never climb ladders, rarely walk more than a flight of stairs, walk, or stand only occasionally, limit his sitting to a frequent basis, and also imposes limitations on bending, twisting, turning, squatting, stooping, kneeling, pushing, pulling, and carrying. (Claimant's Ex. 1, p. 27) Dr. Segal noted that claimant's "biggest and most limiting problem is walking." (Claimants' Ex. 1, p. 12) He opined that Mr. Heser "would be unable to obtain employment at another job due to his limitations from the work injury." (Claimants' Ex. 1, p. 12)

Mr. Heser also testified that his depression and anxiety symptoms continued at the time of trial. He sought evaluation for mental health purposes through a psychiatrist, Adam J. Woods, M.D. (Claimant's Ex. 2) Dr. Woods evaluated Mr. Heser on March 29, 2021. Dr. Woods diagnosed claimant with Adjustment Disorder with mixed anxiety and depressed mood. He referred to claimant's presentation as a "classic case" of adjustment disorder, something that would be presented as an example in a medical textbook. (Claimant's Ex. 2, p. 91) Dr. Woods opined claimant's mental health diagnosis and symptoms are "directly attributable to his work-related injury." (emphasis in original) (Claimant's Ex. 2, p. 91)

Dr. Woods opined that claimant's mental health condition was treatable and that he may experience resolution of some or all of his symptoms with further treatment, including ongoing evaluations with a psychiatrist, medication management, as well as therapy with a licensed therapist for cognitive behavioral therapy. (Claimant's Ex. 2, p. 93) Dr. Woods opined, "Mr. Heser is not capable of employment at this time. The client's psychiatric symptoms … are profound in nature and wholly debilitating." (emphasis in original) (Claimant's Ex. 2, p. 94) Dr. Woods further expounded that claimant's "prospects for employability are poor, at best." (Claimant's Ex. 2, p. 94)

In fact, Dr. Woods commented, "this MD doubts he could even contribute meaningfully to any workplace." (Claimant's Ex. 2, p. 94) Dr. Woods further explained, "if he were somehow to find employment in his current state, the chances are great he would be forced to miss large amounts of work, thus making his employability prospects even worse." (Claimant's Ex. 2, p. 94)

Defendants countered with an evaluation performed by a neuropsychologist, Robert G. Arias, Ph.D., on June 14, 2021. Dr. Arias opined that claimant does not have a mental health diagnosis from a neuropsychological standpoint. He disputed Dr. Woods' diagnosis of adjustment disorder, asserting that claimant did not meet the diagnostic criteria outlined in the DSM-5. He further opined that claimant's MMPI-2-RF testing results "did not indicate a clinical level of distress psychometrically." Therefore,

Dr. Arias opined that claimant does not have a psychological diagnosis or permanency as a result of such a diagnosis. (Defendants Ex. G, p. 1)

Dr. Arias documented that claimant reported, "His plan is to return to work, but he is unsure in what capacity." (Defendants' Ex. G, p. 3) Finally, Dr. Arias critiques and criticizes the basis and opinions offered by Dr. Woods as lacking an "empirical foundation." (Defendants' Ex. F, p. 6)

Dr. Woods offered a responsive report, critiquing and challenging the credentials of a neuropsychologist to offer opinions in this case. Dr. Woods pointed out that Dr. Arias, as a neuropsychologist, is a valuable member of the medical team, but that neuropsychologists "are not clinicians and are never trained to interact with patients or treat them." (emphasis in original) (Claimant's Ex. 2, p. 96) Dr. Woods also asserts that neuropsychological testing and reports are merely signposts, which can suggest diagnoses to a medical doctor, but that the subtle art of medicine is required to actually diagnose a patient. (Claimant's Ex. 2, pp. 96-97) One of Dr. Woods' critiques of Dr. Arias is, "At present, he is unable to work (despite wanting to very badly) and he cannot participate in most of the social events he used to due to his chronic pain, reduced mobility, and a host of other issues which have arisen since the work injury." (Claimant's Ex. 2, p. 98)

Claimant also sought a responsive neuropsychological evaluation and report from Robert Jones, Ph.D. at the University of Iowa Hospitals and Clinics on July 26, 2021. Dr. Jones performed a similar battery of neuropsychological tests as those performed by Dr. Arias. Dr. Jones concluded that claimant's diagnosis is adjustment disorder with depressed mood. He attributed the diagnosis to claimant's work injury in March 2019. Dr. Jones suggested that claimant "may benefit from a comprehensive pain management treatment program that focuses on increasing coping skills/beliefs related to pain." (Claimant's Ex. 10, pp. 188-189) Dr. Jones also suggested that claimant could pursue counseling such as cognitive behavioral therapy and possible medication management through a psychiatrist. (Claimant's Ex. 10, p. 189)

Interestingly, on July 6, 2021, Mr. Heser obtained new employment. At the time of hearing, claimant continued to work at Wade's Auto Collision as an estimator. At the time of hearing, claimant was working full-time, obtaining occasional overtime hours, and earning $15.00 per hour. At the time of his injury, he was earning $18.00 per hour and also working full-time.

Claimant testified Wade's Auto Collision is owned by friends. He testified that he did not believe he would have gotten the job if it had not been a friend's business because he had no experience in the field. Nevertheless, it appears that the predictions of both Dr. Woods and Dr. Segal that claimant was unemployable were not accurate. In fact, claimant began working for Wade's Auto Collision four months after Dr. Woods' evaluation and 6 days before Dr. Woods signed his rebuttal report.

The parties stipulated that claimant sustained permanent disability. I find that he proved permanent injury and disability related to his thoracic spine. Although Dr.

Westpheling opined that claimant sustained no permanent impairment as a result of the work injury, he assigned permanent restrictions. I do not find a zero percent permanent impairment rating to be realistic given this injury and the need for permanent restrictions. Instead, I accept Dr. Segal's permanent impairment rating as accurate and find claimant proved a 16 percent permanent impairment of the whole person as a result of the March 2019 thoracic injury.

With respect to the restrictions, however, I find Dr. Westpheling's restrictions are supported by the findings of an FCE. I find Dr. Westpheling's restrictions to be more convincing and accurate than those offered by Dr. Segal. Perhaps more importantly, I do not find Dr. Segal's opinion convincing when he opines claimant is unable to return to work. Mr. Heser has returned to work and realistically should be capable of performing substantially gainful employment with the ability to lift up to 50 pounds occasionally.

With respect to the mental health issues, I find Dr. Jones' opinion to be convincing. I find that claimant has proven he suffers from adjustment disorder with depressed mood. To the extent that Dr. Woods offered a similar diagnosis, his diagnosis is also accepted. I also find that additional therapy or counseling and medication management may be reasonable treatment options for claimant's adjustment disorder. I reject and do not rely upon the opinions of Dr. Arias.

However, to the extent that Dr. Woods offered an opinion that suggested claimant's mental health condition was sufficient to preclude him from returning to substantially gainful employment, I do not find that opinion to be convincing or credible. In fact, claimant did return to work and should be capable of performing substantially gainful employment. I find that claimant failed to prove any specific restrictions are required as a result of his mental health condition.

That being said, claimant does have physical limitations that preclude him from returning to his prior employment opportunities. Claimant has a limited education, does not possess a GED, and has ongoing symptoms in his thoracic spine that will make heavy manual labor difficult, if not impossible. While he remains capable of substantially gainful employment, his opportunities are reduced as a result of the work injury. Claimant has demonstrated a reasonable motivation to return to work and was working at the time of the hearing. However, he has experienced a reduction in his hourly earnings and loss of ability to return to former positions.

Mr. Heser is relatively young and could retrain if he desired to do so. I find that claimant has proven a moderate loss of future earning capacity as a result of the physical and mental effects of his March 2019 work injury. Specifically, I find claimant has proven a 40 percent loss of future earning capacity as a result of the March 4, 2019 work injury.

Claimant also asserts a claim for additional healing period benefits. The parties concur that claimant was paid healing period benefits from March 5, 2019 through

December 11, 2019. Claimant seeks award of additional healing period benefits from December 12, 2019 through December 15, 2020.

The parties stipulate that claimant was off work between December 12, 2019 and December 15, 2020. Claimant sought some additional treatment after Dr. Westpheling released him from care at maximum medical improvement (MMI) on December 11, 2019. Presumably, defendants assert that the healing period ends on December 11, 2019 because Dr. Westpheling declared MMI on that date. I do not accept Dr. Westpheling's date of MMI as credible and convincing.

In fact, after Dr. Westpheling released claimant from his care, claimant asked for the thoracic spine MRI to be performed. Defendants ultimately sent claimant to Dr. McLennan for evaluation on May 1, 2020. (Defendants' Ex. A, pp. 61-62) Dr. McLennan recommended additional treatment, including treatment with a pain specialist. (Joint Ex. 9, p. 97)

Although defendants denied further liability, claimant obtained further evaluation and treatment with a pain specialist, Dr. Kline. Dr. Kline recommended trigger point injections. Although those injections ultimately did not prove effective for long-term symptomatic relief, I find that claimant did not achieve MMI until after those injections were attempted. Therefore, I find the opinion of Dr. Segal to be most consistent with the ongoing treatment and find that claimant did not achieve MMI until December 15, 2020. I further find that claimant was not capable of returning to substantially similar employment between December 12, 2019 and December 15, 2020.

Mr. Heser seeks an award of past medical expenses contained at Claimant's Exhibit 8. Defendants offered a stipulation that the past medical expenses sought are causally connected to the medical conditions upon which the claim is based. (Hearing Report) Having found that claimant proved causal connection of both the thoracic and mental health claims, I find that claimant has proven a causal connection between the medical expenses contained in Claimant's Exhibit 8 and the March 4, 2019 work injury. I find those medical expenses were reasonable and that they were for medical care that was reasonable and necessary to treat claimant's work injuries.

Finally, claimant seeks award of penalty benefits for an unreasonable delay or denial of benefits. Claimant's post-hearing brief outlines only one basis for a penalty award. Mr. Heser contends that the employer unreasonably evaluated his industrial disability. Claimant asserts that his industrial disability significantly exceeds the five percent (25 weeks) of industrial disability benefits voluntarily paid by defendants. Accordingly, claimant asserts a penalty should be imposed for defendants' improper and allegedly unreasonable assessment of industrial disability.

Defendants provided claimant notice of their decision and the reason for their voluntary payment of 25 weeks of permanent disability benefits. In a letter dated December 4, 2019, the insurance carrier notified claimant that they were converting benefits to permanent disability effective December 11, 2019 and paying five percent industrial disability. Defendants referenced the fact that claimant was declared at MMI

by Dr. Westpheling and that Dr. Westpheling opined claimant sustained a zero percent permanent impairment as a result of the March 4, 2019 work injury. (Claimant's Ex. 6, p. 152) Claimant's contention is that the defendants needed to re-evaluate their position after additional evidence was received and that it was unreasonable for defendants to not volunteer additional permanent disability after the opinions of Dr. Segal and mental health experts were received.

Defendants respond in their post-hearing brief, pointing out that they possessed a zero percent permanent impairment rating. Yet, they voluntarily paid five percent industrial disability in recognition of that fact that permanent restrictions were imposed by Dr. Westpheling. Defendants also point out evidence within the record that include potential reasons to challenge an additional industrial disability award. For instance, defendants point out that claimant failed to actively look for alternate work until close in time to trial. Yet, he necessarily certified he was ready, willing, and able to work by drawing unemployment benefits.

Defendants point out that claimant worked for undisclosed amounts of cash after his work injury. They point out that claimant requires only over-the-counter medications even based on his subjective pain complaints. Defendants introduced some Facebook posts suggesting claimant was employed or active. Claimant earned $18.00 per hour at the time of the injury and $15.00 per hour at the time of hearing. This is an actual decrease in hourly earnings of approximately 17 percent and does not, in and of itself, suggest a significant industrial disability award.

Ultimately, I find that claimant has proven a delay or denial of benefits. Two hundred weeks of permanent partial disability benefits will be awarded in this decision. Defendants voluntarily paid 25 weeks of permanent disability benefits. Accordingly, defendants have denied benefits that were owed.

However, defendants provided written explanation of their basis for only paying five percent industrial disability. Defendants possessed a zero percent impairment rating but did not rest solely on that piece of evidence. Defendants clearly conducted some investigation and made decisions that were more beneficial to claimant than arguably could have been made. The other pieces of evidence pointed out by defendants were not mentioned in their notice letter but certainly provide additional basis for disputing a larger industrial disability award.

Although I ultimately find claimant proved a 40 percent loss of future earning capacity, I find that defendants demonstrated they conducted a reasonable investigation and that their voluntary payment of five percent industrial disability was reasonable, or fairly debatable, under the circumstances of this case.

CONCLUSIONS OF LAW

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).

In this case, I found that claimant proved by a preponderance of the evidence that he sustained permanent impairment and permanent disability as a result of a thoracic spine injury resulting from claimant's fall at work on March 4, 2019. I found that claimant proved certain permanent physical restrictions are necessary as a result of that injury and that claimant proved he sustained a mental injury as a result of the fall and resulting symptoms. Ultimately, I accepted the permanent impairment offered by Dr. Segal, finding claimant proved he sustained a 16 percent permanent impairment of the whole person as a result of his thoracic injury. I found that claimant proved he requires permanent work restrictions, as outlined by the FCE and as accepted and applied by Dr. Westpheling. Having determined that claimant achieved MMI on December 15, 2019, I similarly found that claimant proved he sustained permanent disability as a result of the March 4, 2019 injury.

Addressing permanent disability, I note that claimant sustained a thoracic back injury and proved a mental injury. Both injuries involve unscheduled body parts. Unscheduled injuries are compensated with industrial disability benefits on a 500-week schedule. Iowa Code section 85.34(2)(v).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having considered claimant's age, proximity to retirement, ability to retrain, educational and employment background, coupled with his permanent impairment, permanent restrictions, motivation, the length of his healing period, and all other factors of industrial disability outlined by the Iowa Supreme Court, I found that claimant proved a 40 percent loss of future earning capacity. This is equivalent to a 40 percent industrial disability and entitles claimant to 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

Permanent partial disability benefits commence once claimant reaches maximum medical improvement (MMI) and the extent of permanent impairment can be determined. In this case, I found that claimant did not achieve MMI until December 15, 2020. Therefore, I conclude that permanent disability benefits commence in this case on December 16, 2020. Iowa Code section 85.34(2).

Mr. Heser also asserted a claim for temporary disability, or healing period, benefits. All parties stipulate defendants paid healing period benefits from March 5, 2019 through December 11, 2019. Claimant asserts that he did not achieve MMI and is entitled to an award of additional healing period benefits from December 12, 2019 through December 15, 2020.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found that claimant did not return to work for this employer after the injury date. He also carried either temporary or permanent work restrictions from the date of injury to the date of hearing that preclude a return to a substantially similar employment as that which he performed on the date of injury. Therefore, the healing period ends in this case when claimant achieved MMI. I found that claimant did not achieve MMI until December 15, 2020. Therefore, I conclude claimant proved entitlement to healing period benefits from March 5, 2019 through December 15, 2020, when he achieved MMI. Iowa Code section 85.34(1).

Mr. Heser next asserts a claim for past medical expenses in this case. Claimant details his claim for past medical expenses at Claimant's Exhibit 8.

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).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Having found that claimant proved causal connection of both the thoracic and mental health claims, I similarly found that claimant proved a causal connection between the medical expenses contained in Claimant's Exhibit 8 and the March 4, 2019 work injury. I also found those medical expenses were reasonable and that they were

for medical care that was reasonable and necessary to treat claimant's work injuries. Accordingly, I conclude claimant proved entitlement to an order requiring defendants to pay, reimburse, and otherwise hold claimant harmless for all medical expenses contained in Claimant's Exhibit 8.

Mr. Heser also seeks reimbursement of the independent medical evaluation charges from Dr. Segal. Claimant proves he sustained a compensable work injury on March 4, 2019. Therefore, if he establishes the other prerequisites of Iowa Code section 85.39(2), he may qualify for reimbursement of his independent medical evaluation fees.

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).

In this case, defendants selected and authorized treatment through Dr. Westpheling. Dr. Westpheling declared MMI on October 15, 2019 and issued a permanent impairment rating on November 12, 2019. (Joint Ex. 5, p. 44) Claimant obtained an evaluation performed by Dr. Segal on January 29, 2021. Claimant has established the pre-requisites of Iowa Code section 85.39. Therefore, I conclude claimant has established entitlement to reimbursement of his independent medical evaluation. Iowa Code section 85.39 (2017); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

Dr. Segal charged $3,250.00 for his services, which I find is a reasonable fee in the area where Dr. Segal practices. Having found Dr. Segal's charges to be reasonable, I conclude claimant is entitled to an order requiring defendants to reimburse Dr. Segal's fees in the amount of $3,250.00. Iowa Code section 85.39 (2017); Young, 867 N.W.2d at 843.

Mr. Heser also asserts a claim for penalty benefits pursuant to Iowa Code section 86.13(4). Claimant asserts that defendants unreasonably denied permanent partial disability benefits. More specifically, claimant asserts that defendants failed to conduct a reasonable investigation and voluntarily pay a reasonable amount of permanent partial disability benefits.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

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

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

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, I found that claimant proved a delay in benefits. Defendants voluntarily paid 25 weeks of permanent partial disability benefits. They will be ordered to pay 200 weeks of permanent disability in this decision. Accordingly, there is an obvious denial of benefits to which claimant was owed.

Therefore, the question is whether the defendants had a reasonable basis for denying additional benefits and whether they conveyed their basis for that denial to claimant contemporaneously. In this instance, defendants provided a contemporaneous explanation of their intention to pay five percent industrial disability. At the time they initiated voluntary benefits, they possessed a zero percent permanent impairment rating from Dr. Westpheling. Yet, defendants acknowledged that some permanent restrictions (indeed, the restrictions I accepted as accurate) were in place. In so doing, defendants voluntarily paid some industrial disability benefits. I conclude defendants' actions were reasonable and that they had a reasonable basis, or a fairly debatable reason, to deny additional voluntary benefits. I conclude no penalty benefits are warranted under this set of facts. Iowa Code section 86.13(4).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has proven a compensable work injury and received an award of healing period, permanent disability, and medical expenses. I conclude that it is appropriate to assess claimant's costs in some amount.

Mr. Heser requests reimbursement of his filing fee ($100.00) and service fees ($13.80). Both requests are reasonable and permitted under 876 IAC 4.33(2) and (7). Both requested costs are assessed against defendants as costs.

Claimant also seeks assessment of Dr. Segal's IME charges as a cost. However, these charges were already awarded pursuant to Iowa Code section 85.39. Accordingly, claimant's request to assess Dr. Segal's charges as a cost is denied.

Mr. Heser also requests the evaluations performed by Dr. Woods and Dr. Jones be assessed as costs. Agency rule 876 IAC 4.33(6) permits assessment of the reasonable costs of obtaining no more than two medical practitioners' reports. However, the expense of an evaluation is not to be assessed as a cost and only the expense of drafting a written report offered in lieu of testimony of the witness is taxable as a cost under 876 IAC 4.33(6). Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Ultimately, I did not find the opinions of Dr. Woods to be terribly helpful or convincing. Dr. Woods concluded that claimant was not capable of returning to substantially gainful employment. I exercise agency discretion and conclude that Dr. Woods' expenses should not be assessed as a cost.

However, I did accept the opinions and diagnosis of Dr. Jones. Review of Dr. Jones' billing statement demonstrates that there is no itemization of his fees between his evaluation, testing, record review, and report drafting. Instead, Dr. Jones offers one flat-fee charge for his evaluation, testing, and report. I decline to speculate, estimate, or parcel out charges without any itemization of the time spent on any specific task. Therefore, I decline to assess Dr. Jones' evaluation charges as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from March 5, 2019 through December 15, 2020.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on December 16, 2020.

All weekly benefits shall be payable at the stipulated weekly rate of four hundred sixty-three and 53/100 dollars ($463.53) per week.

Defendants are entitled to credit for all weekly benefits paid to date against this award of benefits, including any overpayment of weekly benefits.

If additional weekly benefits are owed after the aforementioned credits are taken and applied, interest shall be 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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for payment, reimbursement, and to hold claimant harmless for the medical expenses contained and summarized in Claimant's Exhibit 8.

Defendants shall reimburse claimant's independent medical evaluation fees for Dr. Segal's evaluation totaling three thousand two hundred fifty and 00/100 dollars ($3,250.00).

Defendants shall reimburse claimant's costs in the amount of one hundred thirteen and 80/100 dollars ($113.80).

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 __7th__ day of March, 2022.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Matthew Novak (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.