BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MERLYN BROWN, JR., Claimant, vs. NAYLOR SEED CO., Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5067998 ARBITRATION DECISION Head Note No.: 1108

STATEMENT OF THE CASE

The claimant, Merlyn Brown, filed a petition for arbitration and seeks workers' compensation benefits from Naylor Seed Company, employer, and Farm Bureau Property & Casualty Insurance Company, insurance carrier. The claimant was represented by Gary Nelson. The defendants were represented by Jeff Russell.

The matter came on for hearing on February 10, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 6; Claimant's Exhibits 1 through 5; and Defense Exhibits A through D. The claimant testified at hearing, in addition to Dustin Farber. Dina Dulaney was appointed and served as the court reporter for this proceeding. The matter was fully submitted on March 15, 2021, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of his employment on October 26, 2018. The defendants have asserted the defense that the injury is idiopathic. Defendants have also asserted an apportionment defense.

2. Whether this alleged injury is a cause of any temporary or permanent disability.

3. Whether claimant is entitled to healing period benefits from June 11, 2019 through August 11, 2019. Defendants deny responsibility for the injury, however, they stipulate that if they are found liable for the alleged injury, the claimant is entitled to healing period benefits during this period.

4. Claimant seeks permanent partial disability benefits commencing December 12, 2019.

5. Claimant seeks Iowa Code section 85.27 medical expenses. These are denied on the basis of medical causation.

6. Claimant seeks an order of alternate medical care.

7. Claimant is seeking penalty for an unreasonable denial of benefits.

8. Claimant seeks an independent medical evaluation (IME) under Section 85.39, and other costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following. These stipulations are accepted and deemed binding:

1. The parties had an employer-employee relationship as of the alleged date of injury.

2. The commencement date for any permanent disability benefits is December 12, 2019, if any are owed.

3. The elements comprising the weekly rate of compensation are all stipulated and the parties assert the correct weekly rate to be $489.57.

4. Affirmative defenses have been waived, although defendants have preserved the defense that the injury is idiopathic. Defendants alternatively contend that his disability should be apportioned.

5. Credit is not an issue

FINDINGS OF FACT

Claimant Merlyn “Brownie” Brown was 67 years old as of the date of hearing. (Transcript, page 14) He is married with no dependents. Mr. Brown graduated from high school in 1972 and has worked in manual labor jobs for his adult life. He has no formal education beyond high school. He is highly skilled in maintenance and mechanic work. He resides in the small town of Olin, Iowa.

Mr. Brown testified live and under oath at the video hearing and I find his testimony to be highly credible. Mr. Brown provided concise answers. He was a good historian and his responses were consistent with the remainder of the record. There was nothing about his demeanor at hearing which caused me concern about his honesty.

Mr. Brown has been employed with Naylor Seed Company (hereafter, Naylor) since 2005. He is the warehouse manager. He manages the warehouse and farm sites which includes performing a variety of manual labor activities. He also does management activities including some paperwork. The job, however, regularly requires him to engage in physical labor. Naylor views Mr. Brown as a skilled worker who brings great value to the employer.

The central issue in this case is whether Mr. Brown sustained a low back injury for Naylor which arose out of and in the course of his employment. The employer contends that Mr. Brown had serious low back problems for a long time prior to his alleged injury. Mr. Brown admits he had a preexisting low back condition. That fact is not really in dispute. The issue is whether the alleged incident of injury on October 26, 2018, materially aggravated or lit up this condition.

While there is no doubt that Mr. Brown had a preexisting low back condition, the fact of the matter is he never had any treatment whatsoever on his low back prior to his alleged work injury. He had a degenerative condition described by physicians as "stenosis." In the entire record of evidence, however, there is not a single documented medical record indicating that he had ever seen a physician, or any sort of medical practitioner for his low back. Mr. Brown concedes that he had back complaints over the years, however, he downplayed the significance of his symptoms prior to the work injury at hearing. He testified that he had an acute incident of low back pain in 2011 which resolved quickly without any treatment. (Tr., pp. 16, 35-36) He testified he never had any restrictions or inabilities related to his low back prior to October 26, 2018. (Tr., p. 65)

Mr. Brown, however, undoubtedly had symptoms in his low back prior to his work injury. Dustin Farber testified live and under oath at hearing. He managed the day-to-day operations at Naylor Seeds. His testimony is generally credible and it is noted that he testified about Mr. Brown's strong work ethic, general honesty and value to the company. He testified that over the course of his employment with Naylor, Mr. Brown began walking with a hunch in his back. (Tr., p. 77) He testified Mr. Brown would occasionally grimace in pain when he was lifting and seek the help of other employees. (Tr., pp. 77-78) Mr. Brown had, in fact, requested help with labor which was described in detail by Mr. Farber. (Tr., pp. 78-80) I find all of this testimony credible and I find that, in all likelihood, Mr. Brown's low back was mildly symptomatic, at least on an intermittent or occasional basis. Because Mr. Brown never sought medical treatment for this, however, there is no evidence in the record which could quantify this in any meaningful way.

On October 26, 2018, Mr. Brown was operating a tractor backing an auger toward a grain bin. He had one foot on the brake and the other on the clutch. His left hand was on the steering wheel. His right hand was behind him, working hydraulic levers. He was twisted around attempting to look back through the cab windows toward the grain bin. His co-worker, Tyler was on top of a 30 foot grain bin, guiding the process. Mr. Brown testified that while he was in this awkward position he felt his back "snap." (Tr., pp. 17-20; 38-39; Def. Ex. C, p. 10) He described that the pain took his breath away. He immediately reported the injury.

Having reviewed the entire record, I find that there is really no doubt that this incident occurred. Mr. Brown's credible testimony has been consistent through his recorded statement, his sworn deposition testimony and his hearing testimony. His account is properly documented as one would expect in the practitioner's reports. There is really no question that he sustained an injury which arose out of and in the course of his employment.

Mr. Brown completed the remainder of his shift on October 26, 2018, although he testified he did not perform any physical labor. He returned to work on October 29, 2018, and worked through November 1, 2018. He testified he did not lift much and was "babying" his back since the injury. (Tr., pp. 20-21) He reported to the emergency room on November 3, 2018. The following is documented:

> 65-year-old male patient without major medical problems presents to the emergency room with complaints of back pain. Patient states that he felt like his back went out 1 week ago when he was trying to back in Auger while he was on a tractor. He has been 'babying' his back for the last week and using ibuprofen. This morning he was trying to get into a truck and had to turn into kind of at the same time and felt a worsening pain. It is a sharp pain mostly to the right as well as midline to the thoracic/lumbar back that radiates down the right butt cheek. No numbness or tingling or weakness of the legs. No loss of bowel or bladder function. No saddle anesthesia.

(Jt. Ex. 1, p. 2) Mr. Brown testified about the truck incident in detail at hearing. This incident did not occur at work. He was simply getting in a pickup truck.

Mr. Brown stayed off work after his emergency room visit. He was evaluated at his family medical clinic on November 9, 2018. Those notes document the original work injury, as well as the flare-up when he was getting into the pickup truck. (Jt. Ex. 2, p. 29) He underwent an MRI on November 12, 2018. (Jt. Ex. 3, p. 43) He was able to return to work on light-duty on November 19, 2021.

He was eventually referred to Jeannette Liu, M.D., at UnityPoint Neurosurgery in January 2019. She recited a generally accurate, consistent history of the injury and reviewed his MRI. (Jt. Ex. 4, p. 56) She diagnosed spondylolisthesis of lumbar region and recommended physical therapy. (Jt. Ex. 4, pp. 56-57) After attempting further

conservative treatment, fusion surgery was recommended and performed on June 11, 2019. The surgery described as L4-5 laminectomy and posterior lateral fusion was successful. (Jt. Ex. 4, p. 67) The parties have stipulated Mr. Brown was off work for this surgery and condition from June 11, 2019 to August 11, 2019. He had a relatively normal post-surgical care and remained on restrictions. Mr. Brown returned to work for the employer on light-duty thereafter, performing the less physical portions of his job. (Tr., pp. 24-26) Mr. Brown continues to work for Naylor earning the same or better wages. In June 2020, he was provided restrictions of no lifting more than 50 pounds, however, it appears the remainder of his restrictions were lifted. (Jt. Ex. 4, p. 97)

Two physicians rendered expert opinions regarding Mr. Brown's condition, including medical causation. Chad Abernathey, M.D., provided an opinion on June 1, 2020. He reviewed records and interviewed Mr. Brown. He diagnosed lumbosacral strain related to activity aggravating underlying L4-5 spondylolisthesis and stenosis. He opined that Mr. Brown was not under any increased risk of injury based upon performing the work he was performing on October 26, 2018. (Jt. Ex. 6, pp. 105-106) He further opined that "the patient did not have any acute structural change following the 10/26/18 event. His symptoms were subjective and did not recur until 11/3/2018." (Jt. Ex. 6, p. 106) Dr. Abernathey's opinions appear to have been highly influenced by the letter written by defense counsel, who had prepared a well-written, detailed five page letter outlining the factual history. When provided a different history by claimant's counsel in January 2021, Dr. Abernathey provided significantly different opinions. "If Merlyn's oral history as outlined above, is accepted as accurate, the surgery performed in December 2019, which was reasonable and appropriate, would be causally connected to the October 26, 2018 event at work." (Cl. Ex. 5, p. 32) Dr. Abernathey amended this opinion again after conferring with defense counsel in February 2021. (Def. Ex. D, pp. 19-20) After reviewing all of Dr. Abernathey's reports, I find it is likely that his opinion is highly dependent upon what the actual facts are.

Mark Taylor, M.D., also offered expert opinions in August 2020. Dr. Taylor reviewed appropriate medical, as well as legal records and accurately summarized the same. (Cl. Ex. 1, pp. 10-13) He also examined Mr. Brown. (Cl. Ex. 1, pp. 14-15) He diagnosed spinal stenosis, facet hypertrophy, and spondylolisthesis and persistent lumbago. (Cl. Ex. 1, p. 16) He provided the following opinions on medical causation. "Given the history, and the currently available medical records, it is my opinion that Mr. Brown's October 26, 2018 incident at work was a substantial contributing factor with regard to aggravating a pre-existing condition. It could also be viewed as 'lighting-up.'" (Cl. Ex. 1, p. 16) He went on to explain, in some detail, his basis for this opinion. Dr. Taylor assigned a 22 percent whole person impairment related to this condition. He also recommended additional restrictions to those recommended by the treating providers. (Cl. Ex. 1, pp. 17-18)

At the time of hearing, Mr. Brown continues to work for Naylor with no loss of income. His low back continues to be symptomatic. He testified that he has to alternate sitting and standing, both at home and at work. He testified he is unable to sleep in a bed and instead uses a recliner. He has muscle spasms. He no longer lifts heavy bags

at work and his climbing is limited. He testified his physician advised him to consider other work. (Tr., pp. 26-31)

CONCLUSIONS OF LAW

The first question submitted is whether the claimant sustained an injury which arose out of and in the course of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

There is really no doubt that the incident that claimant described at hearing actually occurred. On October 26, 2018, Mr. Brown was backing an auger up to a grain bin when he had a sudden onset of low back pain that took his breath away. He was backing up in a tractor in an awkward twisting position when the pain came on. In their argument, defendants did not truly argue that this incident did not occur. "While Brown may have sustained a minor muscle injury when working for Naylor Seeds on October 26, 2018, the incident was at most a temporary exacerbation of Brown's

symptoms . . . ." (Def. Brief, p. 15) The defendants' argument is geared more toward denying medical causation.

Defendants did contend via the Hearing Report, that the injury is idiopathic and in their brief argue that the injury did not "arise out of" his employment. Defendants cite Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). I find the defendants' reliance on Miedema is misplaced. The claimant in Miedema was using a toilet while Mr. Brown was twisted in an awkward position backing up a tractor to a grain bin for his employer.

The real fighting question in this case is medical causation.

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

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

The expert medical opinions in this case are conflicted. Dr. Taylor has provided a well-reasoned opinion that claimant's conditions (spinal stenosis, facet hypertrophy, and spondylolisthesis and persistent lumbago) were materially aggravated or "lit up" by the work injury. Defendants' expert, Dr. Abernathey provided different, conflicting opinions to the attorneys based upon which set of facts he was provided. I find the opinions of Dr. Taylor to be more convincing. Furthermore, I find the facts set forth by the claimant to be more in line with the record than those submitted by defendants.

While there is no doubt that Mr. Brown had back symptoms prior to the work injury, it is equally clear that his symptoms did not cause him any meaningful or quantifiable disability prior to the work injury. The fact that there is not a single medical record documenting any type of treatment for a low back condition before the October

26, 2018, is important. While the evidence reflects and Mr. Brown even admits, that he did experience some low back symptoms prior to the work injury, a preponderance of evidence strongly supports the finding that the work accident materially aggravated or lit up the degenerative conditions in his low back, necessitating surgery and recovery.

The defendants also argue that the incident where claimant was climbing into a pickup truck on or about November 3, 2018, was an intervening or superseding cause of disability. I find this incident was not an intervening or superseding cause. *See* Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552, 555 (Iowa Ct. App. 2015). The greater weight of evidence supports a finding that the claimant was already significantly symptomatic with his condition when this minor, non-work injury occurred and further aggravated his condition.

For the foregoing reasons, I find that Mr. Brown has proven that his injury is a cause of temporary and permanent disability. The next question is the extent of disability.

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).

I find the claimant is entitled to healing period benefits commencing June 11, 2019, through August 11, 2019.

The parties have stipulated that the claimant's disability is a scheduled disability under Iowa Code Section 85.34(2)(v) (2019). While the claimant's injury is to his whole body, the parties agree that he has not lost any income as a result of his injury and his damages are limited to the extent of the functional impairment rating at this time. Therefore, the only function of the agency in assessing the degree of disability to the claimant's body as a whole, is to choose one of the impairment ratings in the record.

> x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of

earning capacity.

Iowa Code section 85.34(2)(x) (2019). Thus, the law, as written, is not concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of The AMA Guides. The only function of the agency is to determine which impairment rating should be utilized.

Having thoroughly reviewed all of the evidence in the record related to claimant's extent of impairment under the AMA Guides, I find claimant has sustained a 22 percent impairment of the body as a whole as a result of his work-connected low back condition. This is based upon Dr. Taylor's rating. Therefore, I conclude, the claimant is entitled to 110 weeks of permanent partial disability benefits commencing on December 12, 2019.

To the extent defendants argue that claimant's disability should be apportioned out, this argument is rejected. There is no evidence in the record claimant had sustained any ascertainable impairment to his low back prior to the work injury.

The next issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I find the claimant is entitled to the medical expenses set forth in Claimant's Exhibit 2, including mileage. Alternate medical care was also set forth as an issue in the Hearing Report, however, this issue was not briefed. The claimant is entitled to ongoing medical treatment for his condition if necessary and requested.

The next issue is whether claimant is entitled to an independent medical examination (IME) under Section 85.39 or other costs.

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).

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports

may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find that claimant is entitled to an IME under Section 85.39 in the amount of $3,175.50. Claimant is entitled to costs in the amount of $487.90, as set forth in Claimant's Exhibit 3.

The final issue is whether claimant is entitled to a penalty for unreasonably denied benefits.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The defendants denied this claim on March 15, 2019, alleging that an intervening cause was the real cause of claimant's disability. Defendants reviewed evidence at that time, including a recorded statement from the claimant. (Def. Ex. C) While I have rejected the defendants' arguments on the facts, I find that the defendants did have a reasonable basis for denying the claim at that time. Later defendants continued to investigate the claim and obtained medical evidence from Dr. Abernathey, which provided further reasonable basis for the denial. The underlying facts herein were disputed. The fact that I have found in favor of the claimant on these disputed issues does not mean the disputes were per se unreasonable. I conclude the claimant is not entitled to a penalty on this record.

ORDER

THEREFORE, IT IS ORDERED:

All benefits shall be paid at the rate of four hundred eighty-nine and 57/100 ($489.57).

Defendants shall pay healing period benefits to the claimant from June 11, 2019, through August 11, 2019.

Defendants shall pay the claimant one hundred ten (110) weeks of permanent partial disability benefits commencing December 12, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall satisfy the amounts of medical expenses in Claimant's Exhibit 2 which are outstanding, have been paid by a provider/insurer or claimant's behalf, or have been paid by claimant out-of-pocket. Defendants shall reimburse claimant directly only for payments he made out-of-pocket in addition to the mileage in the amount of one thousand three hundred sixty-seven and 79/100 dollars ($1,367.79). Defendants shall reimburse/pay any remaining amounts owed to a provider/insurer directly to the applicable provider/insurer.

Defendants shall reimburse IME costs in the amount of three thousand one-hundred and seventy-five and 50/100 dollars ($3,175.50).

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

Costs are taxed to defendants in the amount of four hundred eight-seven and 90/100 dollars ($487.90).

Signed and filed this 23rd day of November, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

James Russell (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.